IN THE

SUPREME COURT OF THE UNITED STATES

~~77~~ - 283

October Term, 1976

No.

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, LOCAL NO. 13,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

MARTHA GOLDIN
Attorney at Law
1407 North La Brea Avenue
Hollywood, California 90028
(213) 851-7200

GEORGE E. SHIBLEY, ESQ.
Heartwell Building, Suite 505
Long Beach, California 90802
(213) 437-2295

Attorneys for Petitioner

TOPICAL INDEX

TABLE OF AUTHORITIES

UNITED STATES CONSTITUTION

NATIONAL LABOR RELATIONS ACT

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No.

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, LOCAL NO. 13,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on March 15, 1977.

OPINIONS BELOW

The Opinion of the Court of Appeals, reproduced as Appendix "A" hereto, enforcing an order of the NLRB in consolidated cases, is reported at 549 F.2d 1346 (9th Cir. 1977). The order of the NLRB, reproduced as Appendix "B" hereto, enforced by the court below is reported at

210 NLRB 952. The decision and order of the Board in the earlier of the consolidated cases here involved (the Gatlin case), is reported at 183 NLRB 221 and reproduced as Appendix "C" hereto. The order of the court below remanding the Board's decision in Gatlin is reported at 80 LRRM 3213 and reproduced as Appendix "D" hereto. The decision and order of the Board in the later of the consolidated cases here involved (the PMA case) is reported at 192 NLRB 260 and reproduced as Appendix "E" hereto.

JURISDICTION

The judgment of the Court of Appeals, reproduced as Appendix "A" hereto, was entered on March 15, 1977. A timely Petition for Rehearing was denied on May 20, 1977. A copy of the order denying rehearing is reproduced as Appendix "F" hereto. The jurisdiction of this Court is invoked under 28 USC § 1254(1).

QUESTIONS PRESENTED

The consolidated cases involve a complex system whereby longshoremen are registered for and dispatched to stevedoring jobs in the Los Angeles-Long Beach harbor area. Both registration and dispatch are accomplished jointly by Petitioner Union and Pacific Maritime Association (PMA), the collective bargaining agent for the employer stevedoring companies, although Union members staff the joint dispatch hall.

The unfair labor practices are grounded in two premises: first, that the Union utilized an impermissible

sponsorship system in selecting its proposed applicants for registration; and, second, that it discriminatorily dispatched non-registered "casuals" to longshore jobs in a manner which gave Union members referral preference.

The finding, upheld by the court below, that the Union engaged in discriminatory dispatching is based upon data which does not show that a single person was the object or victim of discrimination. The Order of the Board, approved by the Court of Appeals, that the Union "[m]ake whole. . .applicants for employment for any loss of earnings they may have suffered by reason of [the Union's] discriminatory exercise of its dispatch authority" rests upon a record in which counsel for the Board's General Counsel conceded "there is nc evidence . . .to show who was eligible for employment. . . ." (Transcript of the proceedings on remand, p. 13).

Within six months before the charges were filed there had been no occurrence which might have been an unfair labor practice. All the evidence that the Union had at one time used a sponsorship system, its nature and consequences, consists of acts and events barred by § 10(b) of the National Labor Relations Act (NLRA), 29 USC § 160(b). The Union's objections to barred events were overruled on grounds which appear to be contrary to the law as interpreted by this Court in Local Lodge No. 1424, Int'l. Assoc. of Machinists v. N.L.R.B., 362 U.S. 411 (1960).

The court below agreed with the Board that the sponsorship system was discriminatorily favorable to the

Union and that it was unlawful. It affirmed a conclusion "that the Union's sponsorship program was unlawful [and] that the Union's insistence upon that program violated its duty of fair representation. . . ." (Appendix A, pp. 11-12). Yet the record is that within (or without) the § 10(b) period not one job applicant, Union or non-Union, has ever been denied employment opportunity because of the sponsorship program. Furthermore, erroneous conclusions, derived from evidence of a supposed sponsorship practice, which evidence has long been barred by § 10(b), led the court to agree that the Union had refused to bargain in good faith concerning registration in spite of the continual meetings, discussions and negotiations between the parties, culminating in a registration based upon an amalgam of both their proposals.

The consequences of reliance upon time-barred evidence have been grave for the Union. The back pay award, alone, may amount to millions of dollars and destroy a Union already plagued with problems resulting from profound technological changes in the industry. The other "remedies" stigmatize the Union and require it to engage in onerous, needless record-keeping chores.

In the foregoing context, the questions here presented are:

1. Whether an order that the Union provide back pay to applicants for employment is in excess of the Board's jurisdiction and contrary to the NLRA § 10(c), 29 USC § 160(c), where there is no evidence that anyone was eligible for employment, there is no evidence that

anyone was denied employment, and there is no order of reinstatement.

2. Whether a decision that the Union violated the NLRA §§ 8(b)(1)(A) and (2), 29 USC §§ 158(b)(1)(A) and (2), and its duty of fair representation under §9, 29 USC § 159, predicated upon evidence of Union practices which allegedly encouraged Union membership but which were never shown to have discriminated against non-Union applicants for registration or employment is in excess of the Board's jurisdiction.

3. Whether the NLRA §8(b)(3) [29 USC §158(b)(3)] obligation to bargain in good faith imposed upon the Union the duty to acquiesce in particular demands or forego positions found by an arbitrator to be valid.

4. Whether the decision that the Union violated the NLRA, §8(b)(3), 29 USC § 158(b)(3) is contrary to §10(b) [29 USC §160(b)], without support in the record and deprives the Union of due process of law.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions involved are the Fifth Amendment, due process clause; the statutory provisions involved are the National Labor Relations Act, as amended, Sections 7 (29 USC § 157), 8(b)(1)(A) [29 USC § 158(b)(1)(A)], 8(b)(2) [29 USC § 158(b)(2)], 8(b)(3) [29 USC § 158(b)(3)], 8(d) [29 USC § 158(d)], 9(a), [29 USC § 159(a)], 10(b) [29 USC § 160(b)] and 10(c) [29 USC § 160(c)]. The pertinent provisions of the Constitution and

statutes involved are reproduced in Appendix "G" hereto.

STATEMENT OF THE CASE

A. For many years the Union has been the exclusive bargaining representative of workers performing longshore labor in the Los Angeles-Long Beach harbor area under a labor relations agreement between its parent organization, the International Longshoremen and Warehousemen's Union (the International) and PMA. PMA is the collective bargaining agent for stevedore employers on the Pacific Coast.

The agreement establishes various joint committees on which PMA and the Union have equal representation. The Joint Coast Labor Relations Committee is a PMA-International body with jurisdiction over contract grievances and some supervisory power over the Joint Port Labor Relations Committee (Joint Port Committee). The Joint Port Committee, a PMA-Union body, maintains and operates a dispatch hall (the Central Hall) from which registered longshoremen are dispatched for employment as stevedores. Warehousemen are also dispatched from the Central Hall. Although the hall is jointly operated, dispatching is done by persons elected by the Union's membership.

B. The determination that the Union operated the dispatch hall in a discriminatory manner and thereby violated the NLRA is extrapolated from statistics which show no discriminated-against longshoremen. Dispatch preference to stevedoring jobs is given first to fully

registered, i.e., Class A longshoremen, and then to limited registered, or Class B men. Available jobs not filled by registered longshoremen are dispatched to unregistered extras, i.e., "casuals." Class A registered men are usually members of the Union, whereas Class B men and casuals are generally not Union members.

Warehousemen are covered by separate labor relations agreements between the union and employers. They must accept proffered warehouse jobs or they cannot work. The practice of dispatching commercial warehousemen from the Central Hall to extra longshore work when there is insufficient warehouse work is one of longstanding. Terminal Warehousemen (TW) is a category of Union membership available to men who perform terminal warehouse work under separate agreements covering such work. They are required to fill all requests for terminal warehousemen before any of them may be dispatched to extra longshore work.

Between 1967 and 1970 the Union increased its TW membership from under 100 to approximately 635. About 80 to 85 of these were steadily employed by companies under terminal warehouse contracts. During several months in mid-1969, the number of TW's dispatched to extra longshore jobs increased, while the number of other non-registered men dispatched decreased. Whether the change was at the expense of casuals who were not TW's is not known, as there is absolutely no evidence on this question.

C. Either PMA or the Union "may demand additions or subtractions from the registered list as may be necessary to meet the needs of the industry." Class A men are selected from among the B registered men who meet certain criteria. Registration of Class A and Class B longshoremen is accomplished by the Joint Port Committee. In about June, 1967, applications for Class B registration were received, and intermittently thereafter for about two years, the Joint Port Committee discussed the selection and registration of 200-400 of the applicants. Between December, 1968 and December, 1969, the matter was deferred by mutual agreement of PMA and the Union, pending contract negotiations on "containerization" of the industry. No additions were made to the list of B registrants from the time the 1967 applications were received until after May 4, 1970.

D. The purported §8(b)(1)(A) and §8(b)(2) violations rest upon "sponsorship." Sponsorship was a method whereby a longshoreman with "A" registration could recommend an applicant for "B" registration. It had been used for many years and was continued through the 1965 registration to effectuate the requirements of the law and the contract that there be no discrimination on account of race. Thereafter, in November, 1965, the Joint Coast Committee decided that sponsorship would not be used in the future.

In 1966 the Joint Port Committee used sponsorship to screen and register a number of "B" longshoremen

previously authorized by the Joint Coast Committee. Commencing in December, 1966, the committee engaged in negotiations for further registration. When, in January, 1968, the Union rejected a list of 475 applicants submitted by PMA on the basis of criteria developed by it, the dispute went to arbitration. The arbitration, in March, 1968, inter alia ordered that 60 previously agreed-upon applicants be registered immediately and that 186 applicants whose names appeared on both the Union's and PMA's lists be processed for registration. All this occurred prior to the 10(b) period.

One of the supposed acts of sponsorship took place on October 2, 1968, (the first relevant date within the 10(b) time frame). On that date, the Union submitted to the Joint Port Committee for registration processing a list of names which it believed to be the 186 referred to above. It was not; it was a list of 254 (or 256) applicants and sponsors. At the next Joint Port Committee meeting, the Union stated the list had been submitted in error and that a new list would be provided. At the following meeting PMA again submitted its list of 475 applicants. The parties made no decision on either side's proposals. Meetings on the implementation of the March, 1968 arbitrators award continued until about November when the registration question was deferred by mutual agreement, for approximately one year.

Negotiations resumed in the latter part of 1969. The Union suggested criteria which included giving weight to longshore experience and proposed accepting

all those on PMA's list with 100 hours of stevedoring work. PMA rejected the Union's position because most of the men who had acquired the requisite experience as casuals were TW members of the Union. In April, 1970, agreement was reached on the list of 186 applicants, but not on the others. The question was arbitrated and on May 4, 1970, the arbitrator decided that both PMA and the Union had utilized appropriate criteria for selecting applicants; chose the 186 (by then reduced to 172) and an additional 60 whose names were on both the PMA and Union lists, for registration.

Another alleged act of sponsorship within the §10(b) period involves an applicant for "B" registration. In June, 1967, James Phillips, a casual, unregistered longshoreman, completed an application for "B" registration. He had no sponsor. On February 20, 1969, he asked a Union official the status of his application. He was shown his number on the list of applicants (#2074), and was told "[Y]ou don't have a sponsor so I can't very well tell you what to do about it, but there will be some applications out in the near future. . . .[G]et you a sponsor in the meantime." (Appendix A, page 8).

Phillips' only application, without a sponsor's name, was made prior to the 10(b) period. No other application ever became available and he submitted no new application, nor did he get a sponsor. There is nothing in the record to indicate that Phillips was eligible for selection as a "B" registrant, that his name was on PMA's list and rejected by the Union, or that the

Union refused to submit his name in due course according to valid standards and his place on the list.

E. In the Gatlin case, the earlier of the consolidated cases, the Board found "sponsorship" and therefore violations of §§ 8(b)(1)(A) and (2) based upon the Phillips' application and the repudiated October 2, 1968 list of applicants and sponsors. On that record, the Court of Appeals was unable to understand how sponsorship actually worked and its effect, and remanded the case.

In the PMA case, the Board found violations of §§ 8(b)(1)(A) and (2) based upon the purportedly discriminatory dispatch by the Union of TW's to extra jobs, and of § 8(b)(3) because of the Union's position in negotiations on registration that work-experience be considered.

After consolidation of the cases, the Board rendered a decision which essentially combined the results in the separate cases. It ordered the Union to cease and desist from further use of the sponsorship system, from discriminating in favor of Union members in dispatching longshoremen, and from refusing to bargain in good faith. It ordered the Union to pay all applicants for lost wages resulting from its discrimination and to maintain permanent records of all referrals.

F. The Court of Appeals affirmed the Board in all respects. It held the "back pay" award proper without proof that any person had been discriminated against. Whereas the Act permits an order of reinstatement with

or without back pay, the court enforced an order of back pay without reinstatement.

The court brushed aside the Union's contention that sponsorship was a dead issue, long barred by §10(b) of the Act. The opinion simply "revived" old acts and practices, dubbing them interpretive evidence, despite the fact there were no timely acts to construe.

Although there was not the slightest evidence that the Union ever favored any of its members over non-Union job seekers, the court affirmed the Board's findings of discriminatory preference. In the face of a history of continual bargaining, with proposals and counter-proposals throughout, and an ultimate outcome consistent with the Union's position, the court below held that the Union had violated § 8(b)(3). It ordered enforcement of the Board's entire order.

REASONS FOR GRANTING THE WRIT

1. The Back Pay Order Is Not Authorized By the Act. An Order For Back Pay On Account of Losses Suffered Because of the Union's Allegedly Preferential Dispatch Procedures Is Contrary To § 10(c) of the Act In the Absence of Evidence That There Were Applicants Ready, Willing and Able To Take Job Referrals Who Were Refused Dispatch.

The Board found, and the court below agreed, that the Union violated §§ 8(b)(1)(A) and (2) of the Act by giving dispatch preference for casual employment to its TW members. Basing its decision on a statistical compilation which showed an increase in the number of

TWs dispatched and a decrease in the number of other non-registered men dispatched as casuals, the Board concluded that the Union was discriminating in favor of the TWs and therefore against non-Union applicants. The Board deemed it irrelevant that not one non-Union, non-TW applicant ever claimed to have been denied referral; not one ever claimed to have presented himself for dispatch and been turned away in favor of a TW or any other Union applicant. In reliance upon its statistically-derived finding and without proof of loss by so much as one individual, the Board made its backpay order.

There is no precedent for the order. Since this Court's decision in Local 357, International Brotherhood of Teamsters, etc. v. N.L.R.B., 365 U.S. 667, 81 S.Ct. 835 (1961), in which it held that an agreement requiring an employer to obtain casual labor through a union hiring hall is not per se a violation of the Act, litigation has abounded. Its focus has been on discriminatory operation of such hiring halls. Not once has a finding of discrimination been made in the absence of evidence that at least one person was deprived of his rightful job opportunity. Not once has a back pay order been made on behalf of a statistically created class which has no representative victim of the supposed discrimination. See, e.g., N.L.R.B. v. Local 542, 542-A & 542-B, Int'l. U. of Operating Engineers, 485 F.2d 387 (3d Cir. 1973); Pacific Maritime Association v. N.L.R.B., 452 F.2d 8 (9th Cir. 1971); N.L.R.B. v. International Longshoremen's & Ware. U., Local 12, 378 F.2d 125 (9th Cir. 1967); N.L.R.B.

v. Local 138, Int'l. U. of Operating Engrs., 293 F.2d 187 (2d Cir. 1961); NLRB v. Local 138, Int'l. U. of Operating Engrs., 321 F.2d 130 (2d Cir. 1963); NLRB v. Local 138, Int'l. U. of Operating Engrs., 380 F.2d 244 (2d Cir. 1967).

The back pay order, running to an entire class, none of whom have been before the fact finder, violates concepts of due process. Proof of actual discrimination must be made at the administrative level. Hence, proof of actual entitlement to a back pay award must be made at the administrative level. Else, at the compliance stage each statistically ascertained "discriminatee" may present himself, and without ever showing that his decline in employment had been caused by unlawful Union preference give to others, merely establish the amount of his loss. Back pay would be awarded without the issue of actual discrimination having been litigated at any point in the proceedings.

This Court has held that the Board may not order reimbursement in the absence of proof that the funds would not have been paid but for the unfair labor practice. Local 60, United Brotherhood of Carpenters, etc., AFL-CIO v. N.L.R.B., 365 U.S. 651, 81 S.Ct. 875 (1961). The blanket order in this case is, with respect to back pay, precisely the type of order the Court invalidated in Local 60. If an order of reimbursement without a showing that "but for" the unfair practice the payments would not have been made is beyond the scope of affirmative orders permitted by § 10(c), can it be otherwise with a back pay order? It would appear not.

NLRB v. Local 2, United Assn. of Journey & Apprentices, P. & P.I., 380 F.2d 428 (2d Cir. 1966).

> Where no membership in the union was shown to be influenced or compelled by reason of any unfair labor practice, no "consequences of violation are removed by the order [of reimbursement]. . . . The order in those circumstances becomes punitive."

Local 60, United Brotherhood of Carpenters, etc., AFL-CIO v. N.L.R.B., supra, 365 U.S. at 655.

The Board may not make an order which is punitive rather than remedial. Republic Steel Corp. v. N.L.R.B., 311 U.S. 7, 61 S.Ct. 77 (1940). Therefore, it may not "apply a remedy it has worked out on the basis of experience, without regard to circumstances which may make its application to a particular situation oppressive. . . ." N.L.R.B. v. Seven-Up Bottling Co., Inc., 344 U.S. 344, 349, 73 S.Ct. 287 (1953).

The language of the Act is explicit. It says, with respect to back pay, § 10(c) [29 U.S.C. § 160(c)]:

> [T]he Board shall. . .order. . .reinstatement of employees with or without back pay. . . Provided, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him. . . .

Only the quoted language authorizes back pay. While affirmative remedies are within the jurisdiction of the Board, they are encompassed by the more general language of § 10(c), which provides:

> [T]he Board shall. . .order. . .such affirmative action. . .as will effectuate the policies of this subchapter. . . .

No where is "back pay" not linked with "reinstatement."

In the case at bar, there was no order of reinstatement, nor could there be one. The dispatcher was empowered only to refer casuals to jobs. The employer did the hiring. Dispatch was not the equivalent of hire, hence no employment was created by dispatch. That being the case, no right of reinstatement could arise by virtue of a failure to dispatch. Therefore, no back pay award was authorized by § 10(c).

The propriety of the back pay award is also open to question because of the Colonial Hardwood Doctrine. In United Furniture Workers of America, CIO (Colonial Hardwood, 84 NLRB 563 (1949), the Board, albeit referring solely to § 8(b)(1)(A) violations, distinguished between those cases in which an employee is denied access to a plant and those cases in which the union causes a termination or disruption in a worker's employment status. Where, as here, no employment relation is created by dispatch, it does not appear that failure to dispatch can cause an end to the employment status. It follows that back pay is not the proper remedy.

It would seem, from the language of § 10(c) that back pay is an available remedy only where employment as a matter of right is ended or disrupted by an unfair labor practice, e.g., where "but for" the wrongful conduct the

applicant would have had the job; "but for" the wrongful conduct the employee would have retained the job. In such cases, "reinstatement of employees with or without back pay" is appropriate. But in a case such as the instant one, in which dispatch is not the equivalent of hire, failure to dispatch is not the equivalent of refusal to hire or termination of employment; the right of reinstatement does not exist; and back pay is unauthorized.

2. Unfair Labor Charges Involving a Requirement of Sponsorship for Applicants for Registration Do Not Allege Continuing Violations. The Purported Violations Based On Sponsorship Are Barred By § 10(b) [29 USC § 160(b)].

The court below, in effect, held that charges that the Union imposed a requirement of sponsorship by Class A longshoremen on applicants for B registration were allegations of continuing violations. Citing Int'l Union, United Auto, Aerospace & Agri. Imp. Workers v. NLRB, 363 F.2d 702 (D.C. Cir. 1966), a continuing violation, refusal to bargain case, the court rejected the Union's contention that the charges were time barred as § 10(b) has been construed in Local Lodge #1424, Int'l. Assoc. of Machinists v. NLRB, 362 U.S. 411, 80 S.Ct. 822 (1960).

Whether or not the concept of a continuing violation is generally applicable to charges under the Act has produced certain conflicts among the circuits. Notably, with respect to charges of refusal to sign a contract, there is a lack of unanimity of rationale and result.

Thus, the Ninth Circuit holds that it is a continuing violation, with each refusal in and of itself as a substantive matter, an unfair labor practice. NLRB v. Strong, 386 F.2d 929, 931 (9th Cir. 1961). The First Circuit has expressly rejected Strong, and, distinguishing between the general (and presumably, continuing) failure to bargain and a specific failure to do a particular act, has placed a refusal to sign a contract in the latter category, making the event finite in time. NLRB v. Fields & Sons, 462 F.2d 748 (1st Cir. 1972). The Sixth Circuit, while agreeing with the First Circuit that a refusal to sign a contract is not a continuing violation, has adopted a different reason. NLRB v. McCready & Sons, Inc., 482 F.2d 872 (6th Cir. 1972). The circuit has looked to the purpose of the six months limitation period and has decided that it exists, inter alia, to pinpoint the time and nature of defenses. Since a refusal to sign is a precise event at which moment there may be particularized defenses, the extension of the notion of continuing violation to such an unfair labor practice would, in the words of the McCready court, "contravene the purpose of Section 10(b)." (482 F.2d at 875).

The unfair labor practice complained of here was the requirement that applications be sponsored. The only applications involved had been accepted by the Union about two years prior to the earliest complaint. The court below looked to two subsequent occurrences to continue or revive what the Union urged was a defunct

practice: the conversation about sponsorship, with charging party Phillips; and, the submission of a supposedly sponsored list of applicants (almost immediately thereafter withdrawn). Neither of these events could, as a substantive matter, constitute unfair labor practices. Only if, as the court below intimated, the acceptance of sponsored applications long prior to the § 10(b) period was a continuing violation, could those later occurrences amount to timely charges. It appears to the Union that this court precluded such a conclusion by the Local Lodge #1424 decision. In light of the differing views on the continuing nature of purported violations and varying interpretations of the Local Lodge #1424 decision, the question requires re-examination and clarification by this Court.

3. The Decision Below Raises Significant Questions Regarding the Interpretation of the National Labor Relations Act.

(a). Does the duty of fair representation extend to those who are not members of the bargaining unit? The court below held that the sponsorship requirement breached the Union's duty of fair representation under § 9 [29 USC § 159] of the Act. The sponsorship requirement, if indeed there was one within the § 10(b) period, applied to applicants for Union recommendation for registration consideration by the Joint Port Committee. Both Union and PMA could make recommendations to that body; both made final selections, jointly. Is a Union

bound by § 9 to refer from among non-bargaining unit applicants on the basis of unsponsored neutrality? The note by this Court in Chemical Workers v. Pittsburgh Plate Glass, 404 U.S. 157, 181, n.20, 92 S.Ct. 383 (1971), to the effect that the Union has no duty "affirmatively to represent nonbargaining unit members or to take into account their interests. . . ." intimates a negative answer. The court below decided in the affirmative.

(b). Is the decision below contrary to Radio Officers Union of Commercial Telegraphers, AFL v. NLRB, 347 U.S. 17, 74 S.Ct. 323 (1954)? The Court of Appeals held that the Union's supposed sponsorship requirement violated §§ 8(b)(1)(A) and 8(b)(2) [29 USC §§ 158(b)(1)(A) and 8(b)(2)] of the Act. Section 8(b)(2) prohibits a union from causing or attempting to cause an employer to discriminate against an employee in violation of § 8(a)(3). That is, it is a violation if a union (1) causes or attempts to cause employer discrimination which (2) encourages or discourages membership in a labor organization. Not all discrimination, according to the Radio Officers case is a violation of the Act; only that which has the impermissible impact.

In the case at bar, not one applicant was refused an application for registration; not one was denied placement on the list; not one was rejected for employment because of lack of a sponsor; [1/] not one was required to

1/ The Administrative Law Judge in the PMA case expressly refused to find that the charging party, Phillips, had been prevented from being assigned to his share of longshore work, and refused to order the Union to make Phillips whole. See Appendix E, p. 11, n. 23.

join the Union. Furthermore, not one Union member was required to or did remain in the Union because of sponsorship. Can an assumed "discrimination," with neither a discriminatee nor a coerced Union member be an unfair labor practice? The Radio Officers case compels an answer in the negative; the court below answered in the affirmative.

(c). May a violation of the Union's duty to bargain be predicated upon its bargaining demands which, after the fact, the Board deems capricious? The answer would appear to be "no" in light of the proviso in § 8(d) [29 USC § 158(d)] that the obligation of the parties to meet and confer "does not compel either party to agree to a proposal or require the making of a concession." See, NLRB v. American Nat'l. Ins. Co., 343 U.S. 395, 72 S.Ct. 824 (1952). Yet, the Board, as affirmed by the court below, viewed a history of dozens of meetings, proposals and counterproposals, all dealing with registration of Class B longshoremen, and all culminating in a mutually agreeable registration, as a violation by the Union of § 8(b)(3). The decision appears to be in conflict with the Fifth Circuit decision in NLRB v. American Aggregate Co., 335 F.2d 253 (5th Cir. 1964). In that case the court dismissed a civil contempt order for a purported refusal to bargain as previously directed by the Board. The court there rejected the Board's contention that:

> [T]hough the respondent was not obligated to agree on any particular matter at issue between

> it and the board, it can be compelled so to agree by the device of making the right of management to insist upon its own decision of disputed issues depend upon whether [its] decision. . . . appears to the board to be capricious or not well advised.

(335 F.2d at 254). See also, NLRB v. Alva Allen Industries, Inc., 369 F.2d 310 (8th Cir. 1966); NLRB v. Wonder State Manufacturing Co., 344 F.2d 210 (8th Cir. 1965); NLRB v. Almeida Bus Lines, Inc., 333 F.2d 729 (1st Cir. 1964). The decision below allows the Board to dictate terms and conditions by finding that the parties lack of agreement was over improper demands. It should be reviewed to determine whether the Act permits the Board to make such a decision in light of the caveat at § 8(d).

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

MARTHA GOLDIN and
GEORGE E. SHIBLEY

By MARTHA GOLDIN
Attorneys for Petitioner

IN THE

SUPREME COURT OF THE UNITED STATES

77-283

October Term, 1976

No.

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, LOCAL NO. 13,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

APPENDICES TO

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

MARTHA GOLDIN
Attorney at Law
1407 North La Brea Avenue
Hollywood, California 90028
(213) 851-7200

GEORGE E. SHIBLEY, ESQ.
Heartwell Building, Suite 505
Long Beach, California 90802
(213) 437-2295

Attorneys for Petitioner

NATIONAL LABOR RELATIONS BOARD, Petitioner,

v.

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, LOCAL NO. 13, Respondent.

No. 74-3158.

United States Court of Appeals,
Ninth Circuit.

March 15, 1977.

Before DUNIWAY, HUFSTEDLER and ANDERSON, Circuit Judges.

DUNIWAY, Circuit Judge:

In these consolidated cases, the National Labor Relations Board seeks enforcement of its order issued on May 26, 1974, against International Longshoremen's and Warehousemen's Union, Local 13, reported at 210 N.L.R.B. 952. We enforce the order.

In the first of these lengthy disputes, the Union was charged with violating §§ 8(b)(1)(A) and (2) of the National Labor Relations Act, 29 U.S.C. §§ 158(b)(1)(A) and (2) (1970), by requiring that applicants for registration as Class B longshoremen be sponsored by Class A registrants, who were also Union members. On June 10, 1970, the Board issued its decision and order in International Longshoremen's and Warehousemen's Union, Local 13, 183 N.L.R.B. 221 (the Gatlin case), finding that the

APPENDIX "A"

Union had committed the violations. The Board petitioned this court for enforcement of that order, and on April 19, 1972, we remanded the Board's decision for further findings as to "(1) the actual operation of the sponsorship program and (2) the effect of the program." N.L.R.B. v. International Longshoremen's and Warehousemen's Union, Local 13, 9 Cir., 1972, 80 L.R.R.M., 3213, 3214.

While the Gatlin case was pending before us, on July 28, 1971, the Board issued its decision and order in International Longshoremen's and Warehousemen's Union, Local 13, 192 N.L.R.B. 260 (the PMA case), finding that, inter alia, the Union violated [1] Section 8(b)(1)(A) and (2) by continuing to require that applicants for Class B registration be sponsored by a member of the Union or by a former member with a withdrawal card; [2] Section 8(b)(1)(A) and (2) by operating an exclusive hiring hall in a manner which discriminated against non-Union men in referrals by insisting that applicants with Union sponsorship or Union membership be given preference in the referral register; and [3] Section 8(b)(3) by insisting to impasse during negotiations with the Pacific Maritime Association (PMA) upon illegal use of sponsorship and by unilaterally changing the manner of dispatch and registration set up pursuant to the collective bargaining agreement. The Board then petitioned this court for enforcement of that order. After the remand in the Gatlin case, however, we granted the Board's motion to withdraw its application for enforcement in the PMA

case to enable it to take further evidence.

The cases were consolidated and hearings held before an administrative law judge. The Board adopted his findings and conclusions, which affirmed its earlier decision that the Union had violated the Act. The Board ordered the Union, inter alia, to cease and desist (1) from any further use of the sponsorship system; (2) from discriminating in favor of Union members in dispatching longshoremen; and (3) from refusing to bargain in good faith. Affirmatively, the Union was ordered to pay all applicants for lost wages resulting from the Union's discrimination and to maintain permanent records of all referrals.

FACTS

The Union is the exclusive bargaining representative for workers performing longshore labor in the Los Angeles-Long Beach harbor area, under a collective bargaining agreement with PMA, which is the collective bargaining agent for the stevedore employers of the Pacific Coast.

The agreement establishes various joint committees having equal numbers of PMA and Union representatives. The Joint Coast Labor Relations Committee (Joint Coast Committee) has jurisdiction over contract grievances and decisions relating to the operation of the dispatching halls. Beneath that Committee, at each port, there is a Joint Port Labor Relations Committee (Port Committee), which controls the dispatching of longshoremen

through hiring halls and which also controls the registration lists and has the power to make additions to, and deletions from, those lists. Although the Port Committee includes representatives of PMA and the Union, longshoremen are dispatched from the hiring hall by dispatchers elected by the Union's membership.

Under the agreement, first preference in dispatch to longshore jobs is given to registered longshoremen, i.e., Class A longshoremen, and second preference to Class B or limited registered men. When no Class A or Class B men are available, unregistered men or "casuals" may be dispatched. All Class A registrants are normally members of the Union, whereas Class B registrants and unregistered men generally are not Union members.

For a number of years, the Union had maintained a policy of requiring that applicants for Class B status be sponsored by an eligible Class A registrant. In practice, that meant that virtually all sponsors were Union members. On November 23, 1965, the Joint Coast Committee called for a halt to the sponsorship program and informed the Union and PMA that the sponsorship program used in the past would be used only in the current registration of longshoremen and then would be discontinued.

Beginning in January, 1967, a series of Port Committee hearings were held concerning the selection of an additional 200 Class B longshoremen. (The number was later increased to 400). The Union representatives continued to insist upon using the sponsorship system.

After receiving instructions in January, 1968, from the Joint Coast Committee, PMA prepared a list of 475 applicants selected on the basis of a point system giving weight to such factors as education and work experience. The Union refused to approve such a list without applying the sponsorship requirement. PMA, in accordance with section 17 of the contract, then submitted the matter to arbitration. The arbitrator decided that the Union was in violation of the contract by insisting upon the use of sponsors. Despite the arbitration award, the Union refused to cooperate.

At a meeting on October 2, 1968, the Union submitted a list of 254 names for immediate registration as Class B longshoremen. Next to each name on the list was the name of a Class A sponsor. PMA refused to accept such a list based on the sponsorship system. No agreement was reached, and there was no registration of Class B longshoremen before February 12, 1970, when the Union agreed to drop its sponsorship demand.

During this process, in June, 1967, James Phillips, a casual, unregistered longshoreman, completed an application for Class B registration. Phillips did not have a sponsor. When he asked about the status of his application on February 20, 1969, the Union's secretary-treasurer told him that he needed a sponsor. On March 18, 1969, Phillips filed two amended charges claiming that this sponsorship procedure violated §§ 8(b)(1)(A) and (2). Those are the charges upon which

the Gatlin case is based.

The PMA case arose from a slightly different set of facts and concerned alleged preferences given by the Union dispatchers to one category of men with another type of Union membership. Terminal warehousemen (TWs) are a category of union membership, not longshoremen, created early in 1968, initially being only 41 men. That number was increased by the Union's approval of an additional 635 TW applications in 1969.

During typical months from January 1, 1967, to May 25, 1970, approximately 80 TW members were employed steadily under terminal warehouse contracts, and an average of six extra men per day were assigned to other TW contract jobs. Before and during the first few months of 1969, few TW members were dispatched to longshore work as compared to the number of unregistered nonmembers. However, beginning in mid-1969, during the impasse over Class B registration, the number of unregistered nonmembers dispatched to longshore work decreased, while the number of TW members dispatched to longshore work rose dramatically.

In October, 1969, also during the negotiations with PMA, the Union proposed that all those men on PMA's list of 475 Class B applicants with over 100 hours of longshore work in 1969 should receive Class B registration. By a coincidence that is by no means remarkable, the great bulk of those with the 100 hours were TWs who had already been sponsored by Union members to get their TW designation and who had been receiving

referral preferences by the Union dispatchers. PMA refused to accept that proposal because it would have favored TW Union members over non-Union unregistered workers. This impasse also continued until February 12, 1970, when the Union at last voted to implement the arbitrator's award and dropped its insistence upon sponsorship.

ISSUES

This case presents the following issues:

(1) Whether substantial evidence supports the Board's findings that the Union required Union-member or former Union-member sponsorship of Class B applicants and its conclusion that such a procedure violated §§ 8(b)(1)(A) and (2) of the Act.

(2) Whether substantial evidence supports the Board's finding and conclusion that the Union unlawfully discriminated against non-Union workers in its operation of the hiring hall.

(3) Whether substantial evidence supports the Board's findings that the Union insisted to an impasse on an illegal contract provision and unilaterally changed a term or condition of employment in mid-term of a collective bargaining agreement, thus violating § 8(b)(3).

(4) Whether the Board's remedy is reasonable and proper.

(5). Whether the Union's due process rights were violated.

I. The Time Bar of Section 10(b).

The Union raises one argument which permeates the entire case. It maintains that section 10(b) of the Act, 29 U.S.C. § 160(b) (1970), bars any consideration of events which occurred before the six-month periods preceding the filing of the unfair labor practice charges. The relevant part of § 10(b) states: "[N]o complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board . . . ."

The Union's reliance upon Local Lodge No. 1424, Int'l. Assoc. of Machinists v. N.L.R.B., 1960, 362 U.S. 411, 80 S.Ct. 822, 4 L.Ed.2d 832, to support its interpretation of this section is misplaced. That case stands for the proposition that "where occurrences within the six-month limitations period in and of themselves may constitute, as a substantive matter, unfair labor practices . . .earlier events may be utilized to shed light on the true character of matters occurring within the limitations period; and for that purpose § 10(b) ordinarily does not bar such evidentiary use of anterior events." 362 U.S. at 416, 80 S.Ct. at 826 (footnote omitted). See Int'l Union, United Auto., Aerospace and Agricultural Implement Workers v. N.L.R.B., 1966, 124 U.S.App. D.C. 215, 363 F.2d 702, 706-07.

With that proposition in mind, we turn to each of the unfair labor practice charges, considering first the evidence which shows the existence of the unfair labor

practice during the relevant six-month period. Given such evidence, the Board could also consider earlier evidence to clarify the "true character" of those matters, and we also consider that evidence.

II. Unfair Labor Practices.

A. Sponsorship.

First, the consolidated complaints charge that the Union violated §§ 8(B)(1)(A) and (2) in the selection of applicants for registration as Class B longshoremen by requiring sponsorship by its members who were also Class A longshoremen.

We agree with the finding of the Board that the sponsorship program was a form of discrimination in violation of §§ 8(B)(1)(A) and (2). There is substantial evidence in support of this finding. Universal Camera Corp. v. N.L.R.B., 1951, 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456.

First, Phillips' testimony was that, according to a Union officer, the sponsorship program was in effect during the six-month period preceding his filing of the unfair labor practice charge in the Gatlin case.[1/] Specifically, on February 20, 1969, Phillips inquired as to "what kind of consideration would be given [his 1967 application]" (R. 28, Gatlin transcript 44-45). Godfrey, the Union's secretary-treasurer, asked Phillips if he had a sponsor. Phillips said that he did not and was not aware that he needed one. Godfrey replied that "everybody

knows you have to have a sponsor." The conversation ended when Godfrey said "[Y]ou don't have a sponsor so I can't very well tell you what to do about it but there will be some applications out in the near future. I can't say when but you better fill out one and get a sponsor in the meantime."

The Trial Examiner in the Gatlin hearing accepted Phillips' testimony as credible, and that finding was not disturbed on the remand of this case. We see no reason why we should not accept it.

The Union argues that the crucial date was the filing of Phillips' application for Class B registration in 1967, but his conversation with Godfrey shows that on February 20, 1969, the Union was still requiring Class B applicants have a Union sponsor.

In addition, on October 2, 1968, within the relevant six-month period, and during negotiations with PMA, the Union submitted a list of Class B applicants. It listed the names of the applicants and, opposite each, the name of a Class A Union member sponsor. (Gatlin Exhibit No. 3). The minutes of those negotiations meetings show that the Union was continuing to insist upon the sponsorship program during the crucial time period. Those events are sufficient to establish the existence of the unfair labor practice during the relevant period. Other evidence received by the Board helps to "shed light on the true character of matters occurring within the limitations period" and thus, under Local 1424, supra, may be considered by the Board. Much of that information

reveals how the sponsorship program functioned.

The next question is whether the sponsorship requirement violated §§ 8(b)(1)(A) and (2). Section 8(b)(2) makes it an unfair labor practice for a labor organization "to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section. . .," and § 8(a)(3) prohibits an employer from engaging in any discrimination which encourages or discourages membership in a labor organization.

The Union argues that the evidence does not show that all Class A sponsors were Union members and thus does not show that the sponsorship program discriminated between Union and non-Union workers. The Board found that at various times approximately six men who were members of Class A were not Union members. Three of those men may have eventually joined the Union. (Remand transcript at 86, 104). There is no information in the record as to whether any of those non-Union Class A members ever sponsored a Class B applicant. Considering that the Union membership (i.e., Class A, Union members) fluctuated around 3,000 during the relevant period, the number of non-Union Class A members was insignificant. In addition, in the PMA case, the Union stipulated that, if called, witnesses would testify that "[a] sponsor in connection with the registration process is a member of Local 13, or a former member with a valid withdrawal card, who recommends the applicant for registration." (R. at 132-33).

The Union states that "the connection between Union membership and sponsorship was the fortuitous result of the fact the [sic] most "A" longshoremen became Union members." (Brief at 21). The Board was not bound to accept the Union's claim that such a connection was fortuitous, and it did not do so. In all but an insignificant number of cases, only Union members could or did sponsor applicants for Class B registration. Thus, the Board properly found that, for all practical purposes, Class A sponsors were also Union members, and concluded that, given the facts of this case, the sponsorship program was a form of discrimination based on Union membership.

The Board also concluded that the discrimination is unlawful. Such a conclusion is proper where encouragement or discouragement of union membership is the foreseeable consequence or likely effect of the discrimination. Radio Officers' Union v. N.L.R.B., 1954, 347 U.S. 17, 45, 74 S.Ct. 323, 98 L.Ed. 455. Here, each Union member who qualified as a sponsor was entitled to sponsor one person for Class B membership. That privilege was, in essence, a reward for being a Union member. Moreover, to qualify for Class B registration, thus becoming entitled to a preference over non-registered individuals, workers had to seek out Union members and ask their support. If they refused, the result was to block their Class B registration.

As the administrative law judge stated in his remand decision:

> [T]hese sponsors had been clothed by the Union with power over the livelihood of employees seeking registered employment status, including the power to deny sponsorship to an individual for wholly irrelevant [sic] or personal reasons or even because of an applicant's antiunion sentiments. . . For, a plan which requires sponsorship by the Union's members can only lead applicants to believe that there is a connection between his [sic] views toward the Union and his [sic] chances of obtaining a sponsor. (R. at 365).

The natural effect of this sponsorship practice would be to encourage membership in the Union by creating a discrimination in hiring in favor of Class B registrants who had been sponsored by Union members. We agree with the Board that the effect of the Union's sponsorship plan was to encourage Union membership, and that it thus violated §§ 8(b)(1)(A) and (2) of the Act.

The Union attempts to justify its reliance upon sponsorship by arguing that it was trying to give its black Class A registrants an equal chance to sponsor. The Board rejected that defense, stating that during the June, 1967, to February, 1970, period the Union "was not. . .motivated by any concern with giving the group of black members. . .who had been initiated into the Union from 1948 to March 7, 1951, . . the same opportunity to sponsor as other groups." (R. at 363). Other procedures

could have been followed to increase black membership without relying upon sponsorship, and the record also shows that by continuing and expanding the sponsorship program and by using seniority in determining sponsorship eligibility, black sponsors were, arguably, being discriminated against. That evidence supports the Board's finding that this is not a valid defense.

The Board also found, in support of its conclusion that the sponsorship program was unlawful, and as an alternative ground, that the Union's insistence upon that program violated its duty of fair representation under Section 9 of the Act. We agree. A bargaining agent which serves as the exclusive representative of the employees had a duty to represent all the employees fairly. Vaca v. Sipes, 1967, 386 U.S. 171, 177, 87 S.Ct. 903, 17 L.Ed.2d 842. This duty is violated when the Union acts "in an unreasonable, arbitrary, or invidious manner in regard to an employee." Kling v. N.L.R.B., 9 Cir., 1975, 503 F.2d 1044, 1046.

In this case, selection for Class B registration had a substantial impact upon an employee's opportunities for employment because of the referral preference given to Class B members over non-registered workers. The Union's sponsorship system was not a rational means for determining the qualifications of Class B applicants; rather, it served as a form of patronage for Union members. Thus, by insisting upon this sponsorship system, the Union violated its duty to represent fairly all the employees in the unit—including those Class B

applicants who did not have sponsors.

B. Discriminatory Operation of the Hiring Hall.

Union operation of an exclusive hiring hall, pursuant to a collective bargaining agreement, is not unlawful per se, Local 357, Int'l Bhd. of Teamsters v. N.L.R.B., 1961, 365 U.S. 667, 673, 81 S.Ct. 835, 6 L.Ed.2d 11, but discriminatory dispatching which encourages union membership does violate §§ 8(b)(1)(A) and (2). N.L.R.B. v. Local 542, Int'l Union of Operating Engineers, 3 Cir., 1973, 485 F.2d 387; Pacific Maritime Association v. N.L.R.B., 9 Cir., 1971, 452 F.2d 8; N.L.R.B. v. Int'l Longshoremen's and Warehousemen's Union, Local 12, 9 Cir., 1967, 378 F.2d 125.

The discriminatory referral charges regarding the hiring hall were made in the PMA case, which has never been reviewed by this court but was remanded to the Board, at its suggestion, after our order in the Gatlin case. The Union argues that substantial evidence of the unfair labor practice occurring during the relevant six-month periods is lacking. [2/] Again, we disagree.

There is evidence that, when the Union and PMA reached an impasse in negotiations over the selection of additional Class B registrants, the Union added approximately 635 men as TW members of the Union, beginning this process after January, 1969. This was done despite the fact that, during typical months from January 1, 1967, to May 25, 1970, only about 80 to 86 TW members were steadily employed under terminal warehouse contracts.

In 1969, the Union began to give more longshore job referrals to TW members rather than to unregistered non-members. By October 1969 (within one of the required six-month periods) on over half the days, no unregistered non-Union workers were dispatched to longshore jobs, but substantial numbers of TW members were. The Board found that the TW members were receiving a referral preference. Considering the number of non-registered non-members dispatched in January, 1969, the dramatic shift from using non-registered men to TWs strongly supports that finding. Moreover, the rapid increase in the number of TW members, considering the small number of TW contracts and jobs available, also strongly supports the Board's finding that preferential referrals were being made. 3/

In addition, in October, 1969, the Union, during negotiations with PMA, suggested that individuals on PMA's list who had 100 hours or more of longshore work in 1969 be registered in Class B. The Union argues that work experience was a proper basis for selecting registrants. Normally that would be true, but here the suggestion would have aggravated the impact of the Union's preferential referral policy because most men on that list with over 100 hours experience in 1969 were TW members who had been preferred in referral to those jobs over non-registered non-members. The natural consequence of these preferences, therefore, coupled with the Union's proposal for registering men with 100 hours experience, would have been to encourage non-member

casuals to join the Union and thus also be a violation of §§ 8(b)(1)(A) and (2).

C. The § 8(b)(3) Charge.

Section 8(b)(3) of the Act imposes upon the Union an obligation to bargain in good faith. 4/ Negotiations between the Union and PMA regarding the selection of additional Class B registrants began in 1967 and continued without resolution of the dispute until February, 1970. This occurred, or at least the Board could so find, because of the Union's insistence upon maintaining the sponsorship program or upon giving preference to individuals, mostly TW members, with 100 hours of longshore work. 5/ When PMA refused to agree to either demand, an impasse was reached. While the duty to bargain collectively does not compel either party to agree to a proposal or require the making of a concession, it does prevent either side from insisting upon illegal demands. The Union's insistence to impasse, based as it was on unlawful practices, was a violation of its bargaining obligation. N.L.R.B. v. Amalgamated Lithographers, 9 Cir. 1962, 309 F.2d 31, 42-43.

In addition, the Union's preferential referral procedure was a unilateral change of the terms or conditions of employment in the middle of the term of a collective bargaining agreement, another § 8(b)(3) violation. The contract between the Union and PMA prohibits "favoritism or discrimination in the hiring or dispatching or employment of an [qualified] longshoreman. . . ." and

provides for the dispatch of all non-registered men on a "rotational basis." By giving preference to its own TW members over non-registered non-member casuals, the Union unilaterally altered those contractual terms or conditions of employment and violated § 8(b)(3). See Associated Home Builders of Greater East Bay, Inc. v. N.L.R.B., 9 Cir., 1965, 352 F.2d 745.

III. Propriety of the Remedy.

The Union objects to that part of the Board's order which requires it to "[m]ake whole any and all applicants for employment for any loss of earnings they may have suffered by reason of [the Union's] discriminatory exercise of its dispatch authority" and to "[m]aintain permanent records. . .reflecting the basis on which each dispatch is made." (R. at 238).

Section 10(c) of the Act authorized the Board "to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. . . ." The Board's discretion in fashioning remedies which can fairly be said to "effectuate the policies" of the Act is broad. N.L.R.B. v. Gissel Packing Co., 1969, 395 U.S. 575, 612, n.32, 89 S.Ct. 1918, 23 L.Ed.2d 547; Fibreboard Paper Products Corp. v. N.L.R.B., 1969, 379 U.S. 203, 215-16, 85 S.Ct. 398, 13 L.Ed.2d 233. As the Court stated in N.L.R.B. v. Strong, 1969, 393 U.S. 357, 359, 89 S.Ct. 541, 543, 21 L.Ed.2d 546:

> This grant of remedial power. . .does not authorize punitive measures, but "[m]aking the workers whole for losses suffered on account of an unfair labor practice is part of the vindication of the public policy which the Board enforces." Phelps Dodge Corp. v. N.L.R.B., 313 U.S. 177, 197, 61 S.Ct. 845, 854, 85 L.Ed. 1271 (1941). Back pay is one of the simpler and more explicitly authorized remedies utilized to attain this end. (Footnote omitted).

The Board's use of such remedies will not be disturbed in the absence of clear abuse of discretion. Virginia Electric and Power Co. v. N.L.R.B., 1943, 319 U.S. 533, 540, 63 S.Ct. 1214, 87 L.Ed. 1568; N.L.R.B. v. Seine and Line Fishermen's Union, 9 Cir., 1967, 374 F.2d 974, 982-83.

The Union argues that the back pay award would be "in the order of several million dollars" and would conceivably destroy the Union. At this stage, the assertion is speculative. Because the compliance stage of the proceedings has not yet been reached, we have no way of knowing the exact amount involved. Moreover, even if the award did reach the total contemplated by the Union, that does not change its nature from remedial to punitive. The Board is simply requiring the Union to reimburse those who lost income as a result of the Union's illegal discrimination. The Board is not ordering that the employees be made more than whole. Thus, the

order merely removes the effects of the unfair labor practice by giving those who were its victims what they would have received absent the Union illegal practices.

The remedial order is not an abuse of the Board's discretion. Nor does the requirement that the Union maintain permanent records overstep the Board's authority. See Local 138, Operating Engineers v. N.L.R.B., 2 Cir., 1963, 321 F.2d 130, 138.

IV. Due Process.

The Union's final argument, claiming a denial of due process, is without merit. There is no basis at all for an assertion that the administrative law judge did not fully consider the arguments and briefs of counsel. On the contrary, his opinion reveals an exhaustive consideration of all the major issues.

The Board's order will be enforced.

FOOTNOTES

1/ Phillips' amended charge was filed on March 18, 1969, which makes September 18, 1968, to March 18, 1969, the relevant six-month time period under § 10(b).

2/ These charges were filed on September 15, 1969, and November 3, 1969, making the relevant time periods March 15, 1969, to September 15, 1969, and May 3, 1969, to November 3, 1969.

3/ The Union in its reply brief argues that this drastic change can be blamed on a declining market for casual longshore labor. Because the TWs were bound by their TW agreement to be available for dispatch to TW jobs, more TWs would be likely to be available for dispatch to longshore jobs. Few casuals would report to the hall, the argument goes, because of the fewer extra jobs. That fails to explain, however, why on nineteen days in October, 1969, no unregistered longshoremen were dispatched and on those same days over one hundred TWs were. The Board could conclude that at least a few unregistered non-TW men were available for dispatch. This type of discrepancy strongly supports the Board's finding that the Union was giving TWs preference in referrals, despite the overall lower number of jobs available in October, 1969, as compared to January, 1969.

4/ § 8(b)(3), 29 U.S.C. § 158(b)(3) (1970), provides:

"(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * *

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title;"

5/ The Union argues that the failure to reach an agreement regarding Class B registration was not because of any sponsorship demands by it, but rather should be blamed on valid economic considerations, primarily,

continuing negotiations concerning container jurisdiction, stuffing and stripping which was relevant to the registration question. The trial examiner in the original case, and the Board, did not accept that explanation. We find the Board's determination on this issue to be well supported by substantial evidence.

210 N.L.R.B. No. 143

International Longshoremen's and Warehousemen's Union, Local No. 13 (Pacific Maritime Association) and Henry A. Gatlin and James Phillips

International Longshoremen's and Warehousemen's Union, Local No. 13 (Pacific Maritime Association) and James Phillips

International Longshoremen's and Warehousemen's Union, Local No. 13 and Pacific Maritime Association. Cases 21-CB-3296, 21-CB-3326, 21-CB-3457, and 21-CB-3494

May 28, 1974

SUPPLEMENTAL DECISION AND ORDER

By Chairman Miller and Members Fanning and Jenkins

On June 10, 1970, the National Labor Relations Board issued its Decision and Order in Cases 21-CB-3296 and 21-CB-3326 (hereinafter Gatlin), finding that Respondent had engaged in unfair labor practices in violation of Section 8(b)(1)(A) and (2) of the National Labor Relations Act, as amended. 1/

On July 28, 1971, the Board issued its Decision and Order in Cases 21-CB-3457 and 21-CB-3494 (hereinafter PMA), finding that the Union violated Section 8(b)(1)(A), (2), and (3) of the Act. 2/

On April 19, 1972, the United States Court of Appeals for the Ninth Circuit remanded the Board's Decision in the Gatlin case to the Board for more detailed and comprehensive findings, conclusions, and recom-

mendations in order to clarify its decision with regard to the actual operation of the sponsorship program and the effect of the program. Thereafter, because the Decision in the PMA case was based on a record substantially similar to that in the Gatlin case, the Board filed a motion to withdraw its enforcement application in the PMA case which was then before the Ninth Circuit in order to permit the Board to take further action in this case consistent with the Ninth Circuit remand in the Gatlin case. On September 19, 1972, the Ninth Circuit granted the Board's motion.

Thereafter, on January 3, 1973, the Board issued an order in the Gatlin case reopening the record and remanding the proceeding to the Regional Director for Region 21 for purposes of receiving further evidence as to the operation of the sponsorship program and its effect on employment practices in the industry affected. On May 14, 1973, the Board issued an order in the PMA case, reopening the record and remanding the proceeding to the Regional Director for the purpose of receiving such further evidence as to any of the issues in the PMA case which are affected by the terms of the Ninth Circuit's remand in the Gatlin case.

On November 5, 1973, Administrative Law Judge Jerrold H. Shapiro issued the attached Supplemental Decision in this proceeding. Thereafter, the General Counsel, Pacific Maritime Association (herein PMA), and Respondent filed exceptions and supporting briefs, and

PMA filed a brief in opposition to Respondent's exceptions and brief. [3/]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, [4/] findings, [5/] and conclusions [6/] of the Administrative Law Judge as modified herein.

The Administrative Law Judge has to some extent modified the orders issued by the Board in these cases based upon his conclusion that Respondent has discontinued its unfair labor practices relating to the sponsorship program and a discriminatory preference given to TW (terminal warehouse unit) members and has bargained in good faith with the PMA on these matters. The General Counsel has filed exceptions. The General Counsel urges that, while there appears to be no dispute that Respondent did cease to insist upon unlawful sponsorship in February, 1970, and inferentially at least thereafter did bargain with PMA on that matter, there is a paucity of evidence that Respondent has at any time ceased granting preferential dispatch to its TW members. The General Counsel urges that the matter of Respondent's compliance with the Board's orders be left to the compliance stages. We agree. Accordingly, we shall affirm our original orders in these cases.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Respondent, International Longshoremen's and Warehousemen's Union, Local No. 13, Wilmington, California, its officers, agents, and representatives, shall take the action set forth in our original orders in these cases dated June 10, 1970, and July 28, 1971.

SUPPLEMENTAL DECISION

Statement of the Case

JERROLD H. SHAPIRO, Administrative Law Judge: On June 10, 1970, the National Labor Relations Board, herein called the Board, issued its Decision and Order in International Longshoremen's and Warehousemen's Union, Local No. 13 (Henry A. Gatlin), 183 NLRB 221, for convenience designated herein as the Gatlin case, finding that the Respondent International Longshoremen's and Warehousemen's Union, Local No. 13, for convenience designated herein as the Union or the Respondent, violated Section 8(b)(1)(A) and (2) of the National Labor Relations Act, herein called the Act, by requiring that applicants for registration as class B longshoremen be sponsored by class A registrants.

On July 28, 1971, the Board issued its Decision and

Order in International Longshoremen's and Warehousemen's Union, Local No. 13 (Pacific Maritime Association), 192 NLRB 260, for convenience designated herein as the PMA case, finding that the Union violated Section 8(b)(1)(A), (2), and (3) of the Act, inter alia, by its requirement that applicants for registration as class B longshoremen be sponsored by a member of the Union or by a former member with a withdrawal card, and the Union's insistence for a time upon the use of sponsorship in class B registration in its negotiation with the Pacific Maritime Association. In determining that such sponsorship program was illegal the Board relied in part on its findings in the Gatlin case.

On April 19, 1972, the United States Court of Appeals for the Ninth Circuit remanded the Board's Decision in the Gatlin case for more detailed and comprehensive findings, conclusions, and recommendations in order to clarify the decision with regard to the actual operation of the sponsorship program and the effect of the program.[1/] Thereafter, to insure consistency in its Decisions, the Board successfully moved the court to allow the Board to withdraw its application for enforcement in the PMA case, for the purpose of enabling the Board to take further evidence in the case consistent with the court's remand in the Gatlin case.

On May 14, 1973, the Board remanded the Gatlin case and the PMA case to the Regional Director for Region 21 of the Board with instructions that a hearing be held

before an Administrative Law Judge, "for the purpose of receiving such evidence as will permit more definite and precise findings and conclusions as to the type of sponsorship program being operated by the Respondent during all times material to this proceeding and the effect of such program on employment practices in the industry." [2/] On October 2, 1973, a hearing in this matter was conducted by me.

Based upon the evidence adduced at the hearing on remand, the record in the Gatlin and PMA cases, [3/] and in the light of the terms of the court's remand in Gatlin, and having considered the parties' posthearing briefs, [4/] I make the following findings, [5/] conclusions, and recommendations.

I

At this point, to present the matter in a more meaningful context, I shall draw together all of the pertinent facts which in large part have already been found by the Board either in Gatlin or PMA and which in my view are supported by the record on remand. The findings of fact in this section not previously made by the Board are explained herein or in sections II through IV, infra.

The Pacific Maritime Association (PMA) on behalf of its employer members and the International Longshoremen's and Warehousemen's Union (ILWU) on behalf of its locals, including the Union, were parties to a collective bargaining agreement which was effective through 1971.

The contract establishes various joint committees consisting of an equal number of representatives of PMA and ILWU. One of these committees, the Joint Coast Labor Relations Committee, referred to as "the Coast Committee," has coastwide jurisdiction to consider the issues that are presented to it under the contract. The Coast Committee has the power to review decisions relating to the operation of dispatching halls.

The collective bargaining agreement establishes, for each port covered by the agreement, a separate committee known as the Joint Port Labor Relations Committee. The port involved in this proceeding is the Los Angeles-Long Beach harbor. The Los Angeles-Long Beach Joint Port Labor Relations Committee, herein called the "Port Committee," is, as is the case of all similar port committees, composed of representatives of PMA and the local union, and pursuant to the terms of the contract exercises control over the longshoremen registration lists. Subject to the ultimate control of the Coast Committee, the Port Committee has the power to make such additions or subtractions from the registered list as may be needed, and is required to maintain a list showing the registration status of each longshoreman. The contract also provides that the dispatching of longshoremen shall be through halls maintained by the Port Committee and that longshoremen who are not on a registered list shall not be dispatched from the hall so long as there are men on the registered list who are available for work. The preferred treatment given

registered longshoremen is further subdivided into a first preference accorded to fully registered longshoremen known as class A registrants and a second preference accorded to limited registered longshoremen known as class B registrants. If all available class A and class B registrants have been referred, then other longshoremen known as "casuals" or "unregistered" men can be dispatched. All class A registrants are normally members of the Union, whereas class B registrants and unregistered men generally are not union members.

The Union, with the agreement of PMA, historically maintained a policy of requiring that applicants for class B registration be sponsored by eligible members of the Union. However, by agreement between PMA and ILWU officials in November 1965, the Coast Committee terminated the use of sponsorship in registration effective immediately after the then pending 1965-66 registration was completed. But, when additional openings for class B registrants were thereafter created, the Union through its representatives on the Port Committee, over the objections of the representatives of the PMA, adamantly insisted that no applicant for class B registration would be approved by the Union unless, as described in detail below, sponsored by a member of the Union. 6/ The Union maintained this position from about June 15, 1967, until February 1970, at which time it agreed that sponsorship would not be considered in registration, and proceeded to implement the award of the arbitrator, which is described, infra.

The Union adamantly maintained its position that sponsorship was a condition of registration despite the assertion in 1967 and again in 1968 by the Coast Committee of its opposition to the use of sponsorship. The Union's rigidity on the issue forced the matter to arbitration pursuant to the contractual grievance-arbitration procedure. The arbitrator found, inter alia, that the Union was "insisting that the only registration process to which it [would] agree is one that included sponsorship," and specifically concluded, inter alia, that the Union's sponsorship program constituted a violation of the collective-bargaining agreement. 7/ In opposition to the arbitrator's award, the Union continued to insist on using sponsorship in the registration of class B applicants. By this continued insistence on the use of sponsorship the Union, through its representatives on the Port Committee, blocked the registration of class B longshoremen for approximately 2 1/2 years. The Union was able to do this for the reason that although applicants were required to take a physical examination and were interviewed on a nondiscriminatory basis after their selection by the Port Committee, applicants without sponsors were automatically excluded from the consideration by the Port Committee and never got as far as an interview or physical examination. In short, the Union exercised a veto over the registration of class B applicants.

The result of the Union's action was a need to fill longshoreman jobs with a larger number of unregistered

men than would have been dispatched had the class B list been augmented. It was at this point, January 1969, that the Union drastically increased the number of its members among the unregistered terminal warehousemen, herein called TW members, and as found in the PMA case unlawfully gave preference to its TW members over nonmembers in dispatching nonregistered men to longshoremen jobs. Furthermore, as found by the Board in PMA, this illegal preference in dispatching its TW members, when viewed in the context of the total case, was a non-too-subtle maneuver by the Union to obtain class B registration preference for its TW members over the other applicants for class B registration who were not members of the Union, thereby preventing the registration of nonmembers on a nondiscriminatory basis. Simply stated, the Union's preferential referral of its TW members was directly related to the Union's sponsorship program. It was designed to get around the PMA's and the arbitrator's refusal to acquiesce in the Union's insistence that class B registrants have a sponsor.

Now the case has been placed in its context, I will deal with the issues raised by the remand.

II

In Gatlin the Board concluded that the Union was insisting that all applicants for registration as class B longshoremen must be sponsored by class A registrants, all of whom were members of the Union, before such applications would be considered by the Union. In PMA,

however, the Board on the basis of a more complete record found that membership in the Union was not merely coincidental with class A-registered status, but that the Union was insisting that applicants for class B registration status be sponsored by a member of the Union or by a former member with a withdrawal card. I am convinced, based on the evidence set out below, that the record on remand supports the conclusion that eligibility to sponsor was based upon membership in the Union, and that the employees and Union regarded sponsorship as a private internal affair of the Union.

(1). In the PMA case the Union stipulated, "a sponsor in connection with the registration process is a member of local 13, or a former member with a valid withdrawal card, who recommends the applicant for registration" (Par. 41 Joint Exh.). Consistent with this stipulation, the Union's members and leadership were under the impression that the privilege to sponsor was a benefit of membership in the Union. Thus, William Ward, a registered longshoreman and member in the 1950's and 1960's as well as an official of the Union, testified that the sponsorship program was explained to the registered longshoremen as a system giving the right to "each member to sponsor someone." Also, the president of the Union, Curt Johnson, testified in the Gatlin case that he assumed that each of the class B applicants submitted by the Union to the PMA on October 2, 1968, was recommended "by a member."

(2). In the actual operation of the sponsorship program, it appears that a substantial number of fully registered class A longshoremen were declared ineligible to sponsor only because they were not members of the Union on March 8, 1951 (See G.C. Exh. 10, particularly the noneligible sponsors listed in "lists" 2, 4, and 5). [8/] Also, the class B applicants submitted on October 2, 1968, by the Union to the PMA (G.C. Exh. 3), were sponsored by individuals whose eligibility to sponsor was determined by the date on which they were initiated into the Union (see par. 11, Joint Exh. and S-6 and S-8 referred to therein). [9/] Indeed, when the list of the names of the class B applicants and sponsors submitted on October 2, 1968 (G.C. Exh. 3) is compared with the worksheets used by the Union to compile this list (see S-5) approximately 90 of the named sponsors who did not appear on the list of persons entitled to sponsor (G.C. Exh. 10) were individuals who had been accorded sponsorship privileges based on their dates of initiation into the Union, all of which dates were late in 1951, long after March 8, 1951. [10/] Also, in connection with its preparation of the October 2, 1968, list of applicants and their sponsors, the Union stipulated that "the registration advisory committee of local 13 prepared certain lists of past and present local 13 members. . .with the name of the man that each was sponsoring. . ." and further stipulated "that the [Union] also prepared a document. . .[setting] forth the names of members of Local 13 in sequence of their dates of initiation into Local 13," who had not

exercised their sponsorship right under the 1965 procedures (par. 11, Joint Exh.).

(3). At the Port Committee meeting of February 2, 1968, the PMA representatives moved that the Union be found guilty of violating the collective-bargaining agreement by insisting upon using the sponsorship program in the selection of class B longshoremen. The representatives of the Union took the position that the motion should be tabled for further study by the Union. PMA's representatives reminded the union representatives that consistently since the Port Committee's meeting of June 15, 1967, the Union had taken the position that class B applicants would only be registered if they were sponsored. PMA's representatives then explained to the Union's representatives the employers' understanding of the sponsorship program, in these terms:

> The procedure used by [the Union] to approve applicants is that [the Union's] Membership committee or Registration advisory committee calls before it Local 13 members in sequence of their respective dates of initiation into [the Union]. Excluded from being called to appear are all persons who have sponsored men in prior registrations. Each member of [the Union] called before the Registration Advisory Committee has an opportunity to present the name of one applicant to that Committee for approval by the [Union] Membership Committee.

> Any applicant for registration whose name is before the [Port Committee] and who has not been approved by the. . .procedure just described is for this reason denied approval by the [Union] members in the [Port Committee]. In denying approval, these [Union] representatives are acting in accordance with the mandate of the [Union] membership.

The representatives of the Union did not deny the accuracy of this description but took the position:

> [T]he employers' objection to procedures used by [the Union] involves private Union affairs and action of Union committees. The private internal affairs of the Union are not properly before the [Port Committee] for discussion.

The above findings pertaining to the Port Committee meeting of February 2, 1968, are based on the minutes of the meeting (S-53). These minutes, as is the case of all minutes of the Port Committee, were kept during the normal course of business by the PMA. Also, the parties stipulated that, if called, witnesses would have testified under oath as to what is contained in these minutes. (G.C. Exh. R2, par. 3). I realize that the president of the Union signed the minutes of February 2 with the written comment that these particular minutes in general portrayed an inaccurate picture of what took place at

the meeting, that it was slanted in favor of PMA. But I will not, however, give weight to such a general denial, over the specific description by the PMA representatives of the sponsorship system and the Union's reply. I am of the opinion that the Union's failure to specifically disavow the PMA's description of the sponsorship program, plus the whole record, supports the description contained in the February 2 minutes, which I find is an accurate description of the operation fo the sponsorship program and the Union's attitude toward the program.

To conclude, based on the foregoing, although eligibility to sponsor was defined in terms of class A status, I find that the preponderance of the evidence establishes that in the actual operation of the sponsorship program, eligibility to sponsor was conditioned upon membership in the Union [11/] and that the Union viewed the sponsorship program as a private internal union affair.

III

For an undetermined number of years, the Union has maintained a policy that applicants for class B status must be sponsored, as I have found above, by a member of the Union. This policy was acquiesced in by the Employer, the PMA, which together with the Union used the procedure to screen applicants for class B registration. There is no competent evidence indicating the reason for the initiation of this procedure. [12/] There is evidence, however, establishing that early in 1960 the

Coast Committee, which, as described earlier, has the ultimate power under the collective-bargaining agreement over registration practices, issued an order directing that the practice of sponsorship be abolished. The circumstances surrounding the Coast Committee's decision are relevant to this proceeding insofar as they present a more complete picture of what actually took place than the one portrayed in the Gatlin and PMA cases, and provides an insight into the Union's motivation or justification in insisting that the sponsorship program be continued.

On January 22, 1963, the Coast Committee agreed to add 250 class-B-registered longshoremen in the Los Angeles-Long Beach harbor. (PMA Exh. R1). Previously, for a number of years no new class B longshoremen had been registered. At the same time that it authorized the registration of the 250 additional class B registrants, the Coast Committee issued the following instruction to the Port Committee:

> Attention to be given to making sure that the practice of sponsorship of recruits in Los Angeles is continued now that Negroes will have their chances to sponsor effectively so that registration does not result in violations of equal opportunity policies in the Los Angeles Area.

The basis for this instruction was the belief of the Coast

Committee that there were a group of blacks who were eligible to sponsor under the sponsorship program as applied by the Union, and that if they were denied this right they would charge the Union and PMA with discrimination. In this regard, Johnson, the Union's president, testified in Gatlin that a large number of Negroes "were brought into this local" from 1948 through 1950. Also, the parties stipulated at the hearing on remand that blacks were employed as class A longshoremen "at the earliest sometime during World War II and at the latest sometime in 1951 or 1952" with the largest number of blacks being registered as class A longshoremen prior to March 8, 1951.

On November 23, 1965, the Coast Committee reiterated its January 22, 1963, ruling, previously described, that the sponsorship system would be continued in registering class B registrants, but now it limited the future use of sponsorship to the current registration. Specifically, the Coast Committee informed the Union and the PMA that the sponsorship procedure used in the past would be used in the "current registration of Longshoremen at [the Los Angeles-Long Beach] port," and that "the sponsorship procedure shall not be used thereafter." In short, the Coast Committee on November 23, 1965, unequivocally told the Union and PMA that after the current registration of the 250 class B men, they were to consider applicants without regard to sponsorship. [13/] (See S-28, S-36, and G.C. Exh. 6).

Thereafter, at some date in 1966, after reaching agreement on a list of eligible sponsors (see G.C. Exh. 10), the Port Committee used the sponsorship program to screen out applicants and registered the 250 class B longshoremen previously authorized by the Coast Committee. Regarding this registration, it was stipulated by the parties in the PMA case, in substance, that in deciding in November 1965 to continue to allow the use of sponsorship during the then current registration, the Coast Committee felt that prior to 1965 only a low percentage of "Local 13 members who were black" had been able to sponsor and a high percentage of other "union members" had sponsored, so in these circumstances the Coast Committee decided that sponsorship should be used in the 1965-66 registration to effectuate the requirements of the contract and the law that there be no discrimination based upon race.

Regarding the eligibility to sponsor at the time of the 1966 registration, the Port Committee on March 6, 1966, agreed that of the list of sponsors submitted by the Union, 331 were eligible to sponsor class B applicants pursuant to the eligibility standards posted on May 26, 1965, for determining such eligibility. On its face, the posted standard of eligibility states that only those class A longshoremen who had obtained class A status prior to March 8, 1951, and who had not already successfully sponsored a class B applicant for registration would be eligible to sponsor class B applicants in the future. 14/ In the Gatlin case, the president of the

Union, Johnson, testified that the eligibility to sponsor had been limited in this fashion by the Union sometime during 1964 when the Union discovered that a "great many negroes" would be deprived of their sponsorship privilege if any date earlier than March 8, 1951, had been selected as the date cutting off such privilege. Johnson testified that during the years 1948, 1949, 1950, and 1951, a large number of Negroes "were brought into this local" and by using March 8, 1951, as a cutoff date they would have the same right to sponsor as "the other groups." In this regard, it was stipulated in the hearing on remand that, included among the last several hundred class A applicants who were registered immediately prior to March 8, 1951, there was a concentration of blacks.

Based on the foregoing, it seems that the Coast Committee in 1963 and in 1965 was under the impression that through the use of the sponsorship system it would give the blacks an equal chance to sponsor. And, as described above, the Union says it tailored its sponsorship program to effectuate such a policy of equality. Yet, the actual operation of the sponsorship program belies the Union's claim, and it appears that the confidence of the Coast Committee was misplaced. Thus, of the 331 eligible sponsors, all except 45 had seniority in the Union dating prior to 1948. It is undisputed that in determining the order of sponsorship among those eligible to sponsor seniority governs. In other words, because of this policy the Union knew that the group of 45 eligibles among whom the blacks were

presumably concentrated would have to await their turn until the other 286 were given the opportunity to exercise their privilege to sponsor for the 250 job openings. In fact, 34 of the 45 did not use their privilege to sponsor in the 1966 registration.[15/] Finally, the record as a whole, the various stipulations and the testimony of Union President Johnson indicate that very few blacks were included among the 286 sponsors whose union seniority predated 1948. All of these circumstances, in my view, establish that the last time the sponsorship program was actually used in the selection of applicants for class B registration its use resulted in the blacks being discriminated against. They were discriminated against as sponsors by virtue of the seniority system, and if there is a correlation between the race of a sponsor and the applicant he sponsors then black applicants were obviously discriminated against.

IV

The Union called no witnesses at any stage of these proceedings. The only evidence justifying the use of the sponsorship program was that of Union President Johnson, called by the General Counsel, and a number of stipulations which in substance establish that a substantial number of blacks were registered as class A longshoremen in the years 1948-51, up to March 8, 1951, and that because of this the Union picked the latter date as the critical one for determining eligibility to sponsor. The Union, as the Board in Gatlin indicated, seems to be

suggesting that its sponsorship program was reasonable because use of sponsorship, in these circumstances, would cause other blacks to become class B registrants. The Board, however, found that this explanation "has a very hollow ring." I agree, for if the Union's purpose was really to achieve or preserve racial balance, it could have easily accomplished this objective by abandoning sponsorship, as directed by the Coast Committee and the arbitrator, in favor or [sic] a policy of recommending qualified black applicants without regard to whether they happen to know a black member of the Union or a black class A registrant.

Also of significance is the fact that, as found above, the sponsorship program as it was operated was not calculated to increase or encourage the employment of blacks. Indeed, it appears that the last time the system was used black sponsors were discriminated against because of the use of seniority in determining eligibility. Of even greater significance, the evidence establishes that the Union's insistence from June 1967 to February 1970 upon continuing the use of sponsorship was not, as the Union at one point told PMA, motivated by any concern with giving the group of black members (about 34) who had been initiated into the Union from 1948 through March 7, 1951, and had not used their sponsorship privilege in 1966, the same opportunity to sponsor as other groups. For, in subsequently insisting upon the continuation of sponsorship, the Union, as the Board found in Gatlin, used a much broader system of

sponsorship than established by its own rules. The list of class B applicants submitted by the Union to the Port Committee on October 2, 1968, contained 254 names, each with a sponsor; yet, about 70 percent of these sponsors were ineligible to sponsor. The documentary evidence, as found supra, establishes that about 90 of those not eligible were given the privilege to sponsor on the basis of their initiation into the Union on dates subsequent to the March 8, 1951, published eligibility date. The Union offers no explanation for the inclusion of this group as eligible sponsors, nor does the Union offer any explanation for deviating from its established sponsorship program. Without an explanation supported by competent evidence I can not presume a reasonable explanation for this conduct, nor can I presume that included in the 90 were few, if any, blacks, inasmuch as the Union says the reason it established in 1964 the March 8, 1951, cutoff for eligibility to sponsor was that it was prior to this date that there was an influx of blacks with class A status. I presume that the cutoff date would have been drawn at January 1, 1952, if additional blacks had acquired class A status between March 8 and December 31, 1951.

Based on the foregoing, (sections II, III, and IV), I find that the continued use of the sponsorship program, upon the Union's insistence from June 1967 to February 1970, was unrelated to any desire on the part of the Union to assist black sponsors or black applicants and that the sponsorship program, as operated, bore no relationship to

the competence needed for registered longshoremen work. Rather, it was motivated by a desire to regard members of the Union with a form of patronage. I further find that the sponsorship program, as operated, had nothing to do with any legitimate function that the Union had as a bargaining representative.

CONCLUDING FINDINGS

For the reasons given above, I conclude that the evidence developed in this proceeding establishes: (1) In the actual operation of the sponsorship program the eligibility to sponsor a class B registrant was based upon membership in the Union; (2) the Union regarded the sponsorship program as a private union affair outside of the realm of collective bargaining; and (3) the sponsorship program, as operated, was unfair and arbitrary, having no relationship to the Union's role as the employees' collective-bargaining representative.

I further conclude that in the aforesaid circumstances the natural result of the sponsorship program was to encourage membership in the Union. More specifically, sponsorship was not used as a means of screening out unqualified applicants. Contrariwise, it was used as a means of limiting the number of class B registrants, while at the same time restricting the eligibility of sponsors in a manner which shows that the Union was more interested in rewarding members of the Union with a form of patronage than with finding competent

applicants for class B status. Thus, each union member was entitled to sponsor only one successful class B registrant during his entire career as a longshoreman, no matter how many qualified applicants the union member might come to know in his lifetime. Only union members who were initiated prior to March 8, 1951, were eligible to sponsor [17/] and could only exercise this privilege in the order of their seniority in the Union. The Union coupled these severe restrictions on sponsorship with a practice of not entertaining applications which lacked a sponsor and adamantly opposed the nonsponsored applicants proposed by the PMA—applicants selected, as the record shows, on the basis of their experience and training. Clearly then, the sponsorship program as maintained, was not simply a means by which an experienced longshoreman could recommend a deserving fellow unregistered employee; rather, it was based on whether or not an applicant knew the right person; namely, a member of the Union who had not exercised his sponsorship rights. In short, these sponsors had been clothed by the Union with power over the livelihood of employees seeking registered employment status, including the power to deny sponsorship to an individual for wholly irrelevant or personal reasons or even because of an applicant's antiunion sentiments. One result of the sponsorship program was to naturally encourage employees seeking sponsors—and other employees as well—to joint the Union and serve as loyal members. Applicants would only naturally want to get as close to the

source of power as possible. The fact that the eligibility of an employee to sponsor is tied in to his membership in the Union makes this conclusion inescapable. For, a plan which requires sponsorship by the Union's members can only lead applicants to believe that there is a connection between his views toward the Union and his chances of obtaining a sponsor. In this sense the sponsorship requirement is tantamount to requiring that the applicant be favorably disposed toward the Union. Based on the foregoing, I find that the Union's sponsorship program as maintained constituted unlawful discrimination calculated to encourage union membership and as such constituted unlawful discrimination within the meaning of Section 8(b)91)(A) and (2) of the Act.

Since I have concluded that the type of sponsorship program operated by the Union was grounded upon considerations of union membership, I do not believe that it is necessary to decide whether the program violated the Union's statutory duty of fair representation. In the event, however, that the Board or the court feels I have erred, I shall decide this issue. Assuming that the eligibility to sponsor was based upon class-A-registered status and only coincidentally upon union membership, I am of the opinion that in the circumstances of this case the Union's insistence upon the use of this program violated its statutory duty of fair representation. I reach this conclusion for the following reasons.

The Union produced no evidence to demonstrate that the sponsorship program constituted a legitimate

exercise of its role as the employees' bargaining representative or of its contractual authority to operate a hiring hall under its agreement with the PMA. To the contrary, the evidence as found above establishes that no legitimate bargaining representative or hiring hall function was served by the Union's policy. Viewed most favorably to the Union, the evidence establishes that sponsorship was used as a means of rewarding class A registrants with a form of patronage rather than with finding qualified applicants for class B registration. Also, as found above, sponsorship violated the terms of the collective-bargaining agreement, [18/] and when last used tended to discriminate against blacks. For these reasons, the evidence of the way in which the program actually operated buttresses the Board's findings in the Gatlin case that the sponsorship program has "more the ring of an archaic social club than of a labor organization," and its further conclusions that the sponsorship system was "arbitrary and unfair," and that the Union violated its statutory duty "to refrain from such conduct where it adversely affects the employment status of employees and applicants for employment on whose behalf it bargains," in violation of Section 8(b)(1)(A) of the Act.

I further find that the longshoremen, including applicants for employment, who have been exposed to the arbitrary and unfair operation of the sponsorship program as maintained by the Union, will naturally be encouraged to become members of the Union or if already a member

encouraged to remain members in good standing. In this connection, the law is settled that although evidence of unlawful motivation is normally a precondition to a finding of a violation of Section 8(b)(2), "some conduct may by its very nature contain the implications of the required intent; the natural foreseeable consequences of certain action may warrant the inference." Local 357, Teamsters v. N.L.R.B., 365 U.S. 667, 675 (1961). And, "in determining whether or not action taken by a union either encourages or discourages union membership, we examine the reasonable and general tendency of the union's acts." International Longshoremen's Association, Local No. 1581, AFL-CIO, 196 NLRB 1186. In the instant case, the longshoremen (registered and unregistered alike) exposed to the arbitrary and discriminatory operation of the Union's sponsorship program will readily understand they best become or remain loyal union members. The fact that longshoremen generally are not eligible for union membership until they attain class A status is irrelevant, for, as the Supreme Court has noted in a case where the employees discriminated against were also ineligible for union membership because they were not sons of members, "the Act does not require that the employees discriminated against be the ones encouraged" (Radio Officers' Union v. N.L.R.B., 347 U.S. 17, 51); and, in addition, "Union admission policies are not necessarily static and. . .employees may be encouraged to join when conditions change." (347 U.S. at 52).

RECOMMENDATIONS [19]

I shall recommend that the Board reaffirm the rulings, findings, and conclusions made in the Gatlin and PMA cases insofar as they are not inconsistent with any of the rulings, findings, and conclusions set out in this Supplemental Decision. Regarding the Orders in these cases, I shall recommend that the Board reaffirm in their entirety the cease-and-desist portions of the Orders, but that, inasmuch as the Respondent in February 1970 discontinued its unfair labor practices relating to the sponsorship program and the discriminatory preference given its TW members and has bargained in good faith with the PMA on these matters, I shall recommend that the affirmative action portions of these Orders, as well as the notices to members, be modified to take into account the Respondent's subsequent conduct. For the sake of convenience, my recommended Order and notice pertaining to the Gatlin case have been attached hereto as Appendix A and A-1 [omitted from publication], and my recommended Order and notice in the PMA case [omitted from publication] have been attached hereto as Appendix B and B-1.

In considering the remedy in this matter, I have carefully considered whether a Board order requiring the Respondent to cease and desist from the unfair labor practices found has been made moot by Respondent's subsequent compliance. Insofar as the Respondent has complied with the affirmative parts of the Board's

Orders in the Gatlin case and the PMA case, my recommended Order, as indicated above, reflects such compliance. [20] But, in all other respects I have not modified these Orders, for it is my opinion that in the circumstances of these cases the General Counsel and the Charging Parties are entitled to have the resumption of the unfair labor practices barred by a cease-and-desist order. In analagous situations the Supreme Court has repeatedly held that even full compliance with the affirmative provisions of a Board order does not render the cause moot, since the Board is still entitled to the potential comtempt [sic] sanctions of a court decree to prevent future related violations. N.L.R.B. V. Mexia Textile Mills, Inc., 339 U.S. 563, 567-568; N.L.R.B. v. Raytheon Co., 398 U.S. 25 (1970); also see N.L.R.B. v. Southern Household Products Company, 449 F.2d 749 (C.A. 5, 1971). Although I recognize that there are situations where a case will become moot, I am not persuaded to hold, in the light of all the pertinent circumstances, that the General Counsel and the Charging Party are not entitled to the Orders described above.

FOOTNOTES

1/ 183 NLRB 221.

2/ 192 NLRB 260.

3/ The General Counsel has filed a motion to strike Respondent's exception and brief on the ground that they fail to comport with Sec. 102.46(b) and 102.46(c) of the Board's Rules and Regulations. Respondent has filed a brief in opposition. The motion is hereby denied. While we do not condone the statement of exception in terms so broad as to cover the entire Decision of the Administrative Law Judge in this case, the statement of grounds set forth following the statement of the exception makes it clear that the Respondent is contending the Administrative Law Judge's Decision is defective in that Respondent was deprived of due process of law and or equal protection of the laws (see discussion in fn. 4, infra).

The General Counsel has also filed an ancillary motion to strike portions of Respondent's brief as constituting improper, irrelevant, and/or scandalous, scurrilous argument. Respondent, while asking leave to strike part of its brief, opposes the General Counsel's motion in all other respects. The portion of Respondent's brief which both the General Counsel and Respondent seek to have stricken and which we shall strike, contains a personal attack on the Administrative Law Judge based on what Respondent now concedes to be pure speculation. Such unfounded imputations are condemned by the Board. The last paragraph of Appendix TWO, beginning at the bottom of p. 1 and ending with the word "radio" at the top of page 2 thereof are hereby stricken. In all other respects, the General Counsel's motion to strike portions of Respondent's brief is hereby denied as lacking in merit.

4/ The Respondent attempts to demonstrate at length that the Administrative Law Judge did not read or consider any of the briefs, exhibits, stipulations, transcripts, facts, or arguments and that therefore Respondent was

deprived of a fair trial. Respondent's contentions are primarily based on its speculation as to what is possible within the time between the date of the filing of briefs and the issuing of the Administrative Law Judge's Decision. In our opinion there was sufficient time to enable the Administrative Law Judge to consider the entire record in this proceeding including the arguments of the parties. Moreover, the full discussion of the facts and issues in the Administrative Law Judge's Decision demonstrates that the Administrative Law Judge did give full consideration to the entire record including the arguments of the parties.

The Administrative Law Judge erroneously states at one point in his Decision that the Coast Committee's order directing that the sponsorship system be abolished was issued in 1960. However, as noted elsewhere in the Administrative Law Judge's Decision, that order was issued in November 1965 and was effective at the end of the then current registration.

5/ The Pacific Maritime Association has excepted to the Administrative Law Judge's findings with respect to the discriminatory application of the sponsorship system in the years prior to 1967. PMA contends that the parties have stipulated that, of 500 registered during World War II, approximately half were Black and half were white. It further contends that this stipulation is not necessarily inconsistent with the testimony of Union President Johnson that the Blacks came into Respondent during the 1948-51 period. It points out that the 500 were first registered during World War II and then deregistered in 1946 due to a recession in the industry and then registered as work opportunities arose and that by 1951 or 1952 all had been offered reregistration. PMA further contends that on registration the 500 assumed their original registration date. Thus, while Blacks entered Respondent during 1948-51 as Johnston [sic] testified, they entered with their World War II registration dates. Since this history is only background and the findings with respect to it are not determinative of the issues, we find it unnecessary to pass on Respondent's exceptions except to note that we do not rely on the Administrative

Law Judge's findings with respect to the racial impact of the sponsorship program during the 1965-66 period.

6/ Member Fanning continues to adhere to the view, as expressed in his concurring opinion in the Gatlin case, that Respondent's sponsorship requirement is unlawful. Here the Respondent's insistence on sponsorship by Class A registrants--all of whom are members of Respondent--gives rise to an inference that such conduct operates to encourage union membership by demonstrating the potency of union power. Respondent has offered no evidence which would demonstrate that Respondent's insistence on sponsorship for Class B registration serves in any statutorily cognizable way to further the Union's performance of its statutory representative function. International Brotherhood of Painters and Allied Trades, Local Union 1066, AFL-CIO (W. J. Siebenoller, Jr., Paint Company), 205 NLRB No. 110 (Member Fanning's concurrence in fn. 4); General Truck Drivers, Chauffeurs and Helpers Union, Local No. 692, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Great Western Unifreight System), 209 NLRB No. 52 (Member Fanning's concurring opinion). Accordingly, Member Fanning concurs with his colleagues in reaffirming the findings of unlawful conduct.

SUPPLEMENTAL DECISION FOOTNOTES

1/ N.L.R.B. v. International Longshoremen's and Warehousemen's Union, Local No. 13, 80 LRRM 3213 (C.A. 9, April 19, 1972).

2/ The Regional Director was also empowered to receive any evidence deemed relevant and material to any of the issues in these cases affected by the terms of the court's remand in the Gatlin case.

3/ The parties stipulated that "all evidence in the record either in [the Gatlin case or the PMA case] is offered in evidence. . .subject to objection by any party as stated in

the existing record or as stated at oral hearing and subject to contradiction by any party."

4/ I have carefully considered the Respondent's post-hearing objections and motions to strike and observe that the motion insofar as it refers to G.C. Exhs. 22(a) through 39 was granted by the Board in the PMA case. Nothing in the record on remand leads me to recommend that the ruling be modified. Regarding the remainder of the motion which deals with a 34-page stipulation together with about 89 exhibits first made a part of the record in the PMA case, the Board in PMA denied this motion. My independent review of the record convinces me that the ruling was proper and that nothing has changed since PMA to warrant any modification of the ruling. To the contrary, the Respondent by virtue of par. 3 of the stipulation entered into at the hearing on remand (G.C. Exh. R2) appears to have limited the scope of any possible objections on this matter.

5/ "G.C. Exh.R" or "PMA Exh. R" refer to the General Counsel's or the Charging Party's exhibits placed in evidence at the hearing on remand. The references to "G.C. Exh." are to the exhibits of the General Counsel placed in evidence during the Gatlin and PMA cases. "Para Joint Exhibit" refers to the parties Joint Exhibit placed in evidence in the PMA case, and "S-" refers to the numbered exhibits referred to in the aforesaid Joint Exhibit.

6/ The Union further implemented its stance on sponsorship by denying nonregistered longshoremen, such as James Phillips, the opportunity to apply for registered status on the ground that his application must be sponsored.

7/ The arbitrator's construction of the collective-bargaining agreement, of course, is entitled to substantial weight on the issue of the meaning of the contract and specifically whether the use of sponsorship by the Union was contrary to the agreement. The agreement particularly prohibits "favoritism or discrimination in the

hiring or dispatching or employment of any [qualified] longshoreman. . . " and also requires that any member of the Port Committee who "objects to the registration of any man. . .shall be required to give a reason therefore" --language which plainly dictates that applications be considered on a rationale basis and not on some basis of personal friendship or membership within the Union. Based on the language of the collective-bargaining agreement and the award of the arbitrator, I find that the insistence of sponsorship by the Union in the registration of class B registrants was in violation of the collective-bargaining agreement.

8/ Specifically, in this regard, Paul Van Delinder in 1966 was declared ineligible to sponsor because he had transferred from another ILWU local union after the deadline date of March 8, 1951, even though he had been registered as a class A longshoremen [sic] since November 6, 1945 (G.C. Exh. 10 at p. 10-11). Thereafter, the Union apparently discovered that Van Delinder had been initiated into the Union on June 25, 1951 (see S-5), whereupon his name was submitted on October 2, 1968, as an eligible sponsor (G.C. Exh. 3 at p. 9).

9/ Likewise, Ward, a member of the Union and an official of the Union during times material to this case, testified that a requirement for sponsorship eligibility was that sponsors be "union members whose initiation date was prior to March 8, 1951." In practice, however, as described infra, the Union permitted members to sponsor who were initiated even after March 8, 1951.

10/ In Gatlin the court observed that "no findings were made with regard to the 179 sponsors who did not appear eligible under the union's posted eligibility criteria for sponsors." As found above, about 90 or more were included on the basis of being initiated into the Union on dates subsequent to the posted eligibility date. Included in this list of 90 were about 23 who were declared ineligible by the Port Committee at the meeting of March 3, 1966, for the reason that they had registered after the eligibility date (see G.C. Exh. 10, list 7). Also,

from the record I have determined that four sponsors on the October 2 submission had, at the March 3, 1966, Port Committee meeting, been judged ineligible to sponsor because they had already used their sponsorship privileges; two more had been judged ineligible having transferred into the Union from other local unions after March 8, 1951. (See G.C. Exh. 10 and compare with G.C. Exh. 3). I am not able to make findings as to the remaining ineligible sponsors appearing in the Union's submission of October 2, 1968.

11/ The parties stipulated that during the period of time when the sponsorship program was in use that six class A registrants, not named, were not members of the Union. The Union presumably had the names of these registrants in its possession, yet it adduced no evidence that these nonmembers were accorded sponsorship rights. Under the circumstances, I presume that this group of class A registrants were not among the eligible sponsors of March 13, 1966, or the sponsors in the Union's submission of October 2, 1968.

12/ On the subject of the "genesis" of the sponsorship program, Respondent, in its posthearing brief, states "[i]t was only natural that the longshoremen of the '30's and '40's whether members of an ethnic, racial or economic minority, hit upon 'sponsorship' as a means of assuring some minimum job opportunities for their sons." [Emphasis supplied].

13/ William Ward, a member of the Coast Committee representing the ILWU, testified that his recollection of the above meeting was not clear and he would have to refresh his memory by reading the minutes of the meeting (S-28). Then, without doing this, Ward, in substance testified that he recalled that the sponsorship program was to continue indefinitely until all of the eligible "members of the Local" had an opportunity to sponsor someone. But he later qualified this by testifying he meant that the understanding was "they would continue to use sponsorship for the upcoming addition to the registration list." On this subject, Ward was not a

convincing witness. He impressed me in bearing and demeanor as having no independent recollection of what had taken place at the Coast Committee meeting held 8 years ago. I reject his testimony on this subject. Also, on this matter, I note that the Union at no point in its discussions with PMA took the position that the Coast Committee had agreed on November 23, 1965, or had agreed on any other date to allow the Union to use sponsorship indefinitely until all of the eligibles had exercised their sponsorship privileges.

14/ I have found, supra, that in practice eligibility to sponsor was conditioned primarily upon membership in the Union and, if at all, only coincidentally upon class A status.

15/ Compare G.C. Exh. 10, which contains the names of the 45 1948-51 eligible sponsors, with G.C. Exh. 3 which contains the names of the sponsors submitted by the Union on October 2, 1968. Thirty-four of the 45 found eligible in 1966 reappeared on the submission on October 2, 1968.

16/ In deciding whether the ultimate findings in this proceeding establish a violation of the Act I have been guided by the principle of law set out by the Board in International Union of Operating Engineers, Local 18, AFL-CIO, 204 NLRB No. 112:

> When a union prevents an employee from being hired. . .it has demonstrated its influence over the employee and its power to affect the livelihood in so dramatic a way that we will infer—or, if you please, adopt a presumption that—the effect of its action is to encourage union membership on the part of all employees who have perceived that exercise of power. . . . But the inference may be overcome, or the presumption rebutted. . .where the facts show that the union action was necessary to the effective performance of its function of representing its constituency. (Id.)

17/ This restriction was not inviolate when a large enough group of union members was involved. Thus, as

described supra, the Union made a group of 90 members eligible to sponsor who were initiated into the Union during the latter part of 1951.

18/ In this regard, the Union's continued insistence upon sponsorship after the adverse decision of the arbitrator refutes any contention that the Union adopted its position based upon a good-faith belief that sponsorship was not in derogation of the contract.

19/ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided by Sec. 102.48 of the Rules and Regulations be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

20/ There is, however, no evidence or contention that the Respondent has complied with the "make whole" affirmative action part of the Order in PMA requiring it to make whole certain applicants for loss of earnings. For this reason, I have not modified this part of that Order.

183 NLRB No. 28

International Longshoremen's and Warehousemen's Union, Local No. 13 and Henry A. Gatlin and James Phillips and Pacific Maritime Association, Intervenor. Cases 21-CB-3296 and 21-CB-3326.

June 10, 1970

DECISION AND ORDER

By Members Fanning, Brown and Jenkins

On October 29, 1969, Trial Examiner Richard D. Taplitz issued his Decision in the above-entitled proceeding, finding that the Respondent Union had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent filed exceptions to the trial examiner's Decision and a supporting brief, and the Intervenor filed a brief in support the decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this proceeding to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no

APPENDIX "C"

prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions, the briefs, and the entire record in this proceeding, and hereby adopts the findings, conclusions,[1/] and recommendations except insofar as they are inconsistent herewith.

THE REMEDY

The Trial Examiner recommended that Respondent be ordered to bargain on request with the Intervenor as to the number of applicants to be registered as class B longshoremen. He also recommended that Respondent cease and desist from causing or attempting to cause warehousemen to be given preferential hiring treatment. In the circumstances of this case, we do not agree that either of these remedies is necessary or appropriate at this time. There is no allegation in the complaint that Respondent has unlawfully refused to bargain nor can it be said that the issue was fully litigated at the hearing. Moreover, we believe that part of the Recommended Order requiring Respondent to cease and desist from requiring sponsorship, which we shall adopt, effectively removes what has been an impediment to the solution of the registration problem between the parties. With regard to the preferential hiring of warehousemen, we again note the absence of a complaint allegation in this respect. Some evidence on the record tends to show that under certain circumstances warehousemen members of

the Union are referred to longshore jobs prior to casual longshoremen. There is no probative evidence, however, that the preferential referral of warehousemen is directly related to the Union's unlawful sponsorship program. But we are not blind to the possibility of the ulitization of various means to effectively preserve the practice of sponsorship herein declared unlawful. In view of this, we will frame an order broadly proscribing any attempts to perpetuate this practice.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, International Longshoremen's and Warehousemen's Union, Local No. 13, Los Angeles, California, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Requiring that applicants for class B registration status with the hiring hall run by the Joint Port Labor Relations Committee be sponsored by longshoremen with class A registration status or by members of said Union.

(b) In any other manner attempting to perpetuate the practice of sponsorship by members as a condition of eligibility for referral to longshoremen's work.

2. Take the following affirmative action to effectuate the policies of the Act:

(a) Notify Pacific Maritime Association that it will no longer insist upon sponsorship as a condition for registrations as class B longshoremen.

(b) Post at its offices and meeting halls and at the hiring halls operated by the Joint Port Labor Relations Committee copies of the attached notice marked "Appendix." [2/] Copies of said notice, on forms provided by the Regional Director for Region 21, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 21, in writing, within 10 days from the date of this Order, what steps have been taken to comply herewith.

APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a trial at which all sides had the chance to give evidence, a Trial Examiner of the National Labor Relations Board has found that we violated the National

Labor Relations Act, and has ordered us to post this notice.

The Act gives all employees these rights:

To engage in self-organization

To form, join, or help unions

To bargain collectively through a representative of their own choosing.

To act together for collective bargaining or other mutual aid or protection.

To refrain from any and all of these.

WE WILL NOT do anything that restrains or coerces employees with respect to these rights. More specifically,

WE WILL NOT require that applicants for class B registration status with the hiring hall run by the Joint Port Labor Relations Committee be sponsored by longshoremen with class A registration status or by members of International Longshoremen's and Warehousemen's Union, Local No. 13.

WE WILL NOT attempt to perpetuate in any manner the practice of sponsorship by members of International Longshoremen's and Warehousemen's Union, Local No. 13, as a condition of eligibility for referral to longshoremen's work.

INTERNATIONAL
LONGSHOREMEN'S AND
WAREHOUSEMEN'S UNION,
LOCAL NO. 13
(Labor Oranization)

Dated By
(Representative)(Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Eastern Columbia Building, 849 South Broadway, Los Angeles, California, 90014, Telephone 213-688-5200.

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

RICHARD D. TAPLITZ, Trial Examiner. This case was tried at Los Angeles, California, on August 21 and 22, 1969.[1/] The issues litigated were framed by a complaint dated May 16, as amended at the hearing, alleging violations of Section 8(b)(1)(A) and (2) of the National Labor Relations Act, as amended, and an answer dated June 6, as amended at the hearing, filed by International Longshoreman's [sic] and Warehousemen's Union, Local No. 13, herein called Respondent, which admits some and denies other factual allegations of the complaint but denies that Respodnent violated the Act. The complaint was based on a charge and amended charge filed by Henry A. Gatlin on January 27 and March 18 in Case 21-CB-3296, and a charge and amended charge filed by James Phillips on March 3 and 18 in

Case 21-CB-3326. These cases were consolidated with the issuance of complaint. All parties appeared at the hearing and were given full opportunity to participate, to adduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of the General Counsel, Respondent, and the Pacific Maritime Association, who intervened at the commencement of the hearing.

ISSUES

1. Whether Respondent requires that in order to receive class B registration, which is a preferred hiring status as a longshoreman, an applicant be sponsored by a class A registrant or a member of Respondent.

2. If the answer to number 1 is in the affirmative, whether such a requirement violates Section 8(b)(1)(A) and (2) of the Act.

Upon the entire record[2/] of the case and from any observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I. The Business of the Association

Pacific Maritime Association, herein called the Association, is a California Corporation with offices and places of business in Wilmington and San Francisco, California. It is the collective-bargaining representative

on a multiemployer basis for various employers engaged in longshore and stevedoring operations in the vicinity of Long Beach and Los Angeles, California, harbors, herein called the Los Angles harbor area. In this capacity, the Association bargains with the International Longshoremen's and Warehousemen's Union, herein called the International, which is the parent of Respondent and acts on behalf of itself and its locals. The employer-members of the Association annually perform services valued in excess of $50,000 in the transportation of goods and passengers between the State of California and other States and foreign countries.

The complaint alleges, the answer admits, and I find that the Association and its employer-members are employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization Involved

The complaint alleges, the answer admits, and I find that Respondent is a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices.

A. <u>The Setting With Regard to Job Referrals.</u>

The Association, on behalf of its employer-members, and the International of its Longshore Locals, including Respondent, are signatories to an outstanding collective-bargaining contract known as the Pacific Coast Long-

shore Contract Document 1966-71. The contract establishes various joint committees consisting of representatives of the employer-members of the Association and the International and locals. One of these committees, the Joint Coast Labor Relations Committee, herein called the Coast Committee, has coastwide jurisdiction to consider the issues that are presented to it under the contract. The coast [sic] Committee has specific power to review decisions relative to the operation of dispatching halls. The contract also establishes a separate committee known as the Joint Port Labor Relations Committee for each port affected by the contract. The Port committees, in which the representatives of Respondent and of the Association have equal voting power, are given control of longshoremen registration lists of the port. A port committee, subject to ultimate control of the coast committee, has the power to make additions to or subtractions from the registered lists as is necessary and is required to maintain a list of longshoremen showing their registration status. The contract also provides that the dispatching of longshoremen shall be through the halls maintained by the port committees and that longshoremen who are not on a registered list shall not be dispatched from the hall or employed by any employer when there is a man on the registered list who is available for work. The contract further provides that first preference in dispatch and employment shall be given to fully registered longshoremen (known as class A

registrants), and that second preference shall be given to limited registered longshoremen (known as class B registrants). If all available class A and class B registrants are referred, then other longshoremen (known as casuals) can be dispatched. The dispatchers in the hall are, pursuant to the contract, selected by the Union through elections.

As is required in the contract, the Association and Respondent do maintain a joint port labor relations committee for the Los Angeles harbor area. This committee, herein called the Port Committee, maintains a central dispatching hall for the referral of longshoremen who are class A and class B registrants at 343 Broad Avenue, Wilmington, California. At this dispatch hall, class A registrants are referred first, class B registrants are dispatched second, and warehousemen (where there is no warehouse work available for them) are dispatched third. When there are more jobs than can [be] filled by the available class A and class B registrants and warehousemen, referrals of casual longshoremen are made from a "casual hall" at a different location. The casuals are extra longshoremen who have no priority in referrals.

These findings are based on the uncontested testimony of Frank P. Aguilar, chief dispatcher for the referral hall. Aguilar also credibly testified without contradiction that the warehousemn are members of Respondent who, when there is warehouse work available for them, work for employers who are not covered by the contract between the Association and the Respondent.

The warehousemen are both commercial and terminal warehousemen. They have a union number that begins with TW. Warehousemen do "stuffing and stripping" (loading and unloading) of vans and containers. However, Aguilar's testimony became confused with regard to the source of his authority to refer warehousemen for longshore work after "B" registrants and before casuals. At one point he testified that "A" and "B" registrants were dispatched pursuant to joint order but that warehousemen were dispatched on "unilateral" authority; that is, from orders that go back to the International, down to Respondent, and then to the hall. At another point he testified that he had a directive from the Coast Committee to refer the warehousemen. In any event there appears to be no provision in the contract for the referral of warehousemen.

B. Sponsorship.

1. Those qualified to sponsor.

The sponsorship arrangement in effect in 1965 was accurately described in a notice that was posted in Respondent's hall at that time. [3/] It read in part:

NOTICE RE SPONSORING APPLICANTS FOR
LIMITED
(CLASS "B") REGISTRATION
LONGSHOREMEN

Over the past years, men who obtained full (Class "A") registration in Los Angeles Long Beach prior

to March 8, 1951, and who had such status on March 8, 1951, have had the opportunity to sponsor a man for limited (Class "B") registration as longmen in this port at times when additional men were being registered. The conditions for eligibility of the sponsor were as follows:

1. Persons eligible to sponsor are those who were fully registered longshoremen in the Port of Los Angeles-Long Beach on March 8, 1951, and who at the time of sponsorship (a) are registered as longshoremen or clerks or walking bosses (including those on leave of absence or on military leave), or (b) are retired on an ILWU-PMA pension from such employment.

2. Such persons have the privilege of sponsoring one otherwise successful applicant for limited (Class "B") registration after March 8, 1951.

3. Anyone who has so sponsored previously has exhausted his sponsorship privileges under the sponsorship program; he cannot sponsor any applicant at any subsequent time. He has lost his privileges if he has sponsored an applicant for limited (Class "B") registration who was registered on the basis of his sponsorship, even if the man so registered has since died, been deregistered for any reason, left the industry, etc.

4. Any person entitled to sponsor an applicant has not lost this privilege if he has sponsored an applicant for limited (Class "B") registration who was not registered (such as a man rejected by the Committee), or if he has sponsored only for full (Class "A") registration.

The Joint Coast Labor Relations Committee

wishes to determine which men would still be eligible to sponsor a man for registration under the above rules.

This is to give notice that no man shall hereafter have any opportunity to sponsor a man for longshore registration unless he files a request to sponsor on or before July 1, 1965. Request shall be considered only if submitted by someone eligible under the above rules and only if it is on the form that is prescribed and is filed in triplicate within the time limit set forth above.

2. The meetings and the arbitration.

As indicated in the minutes of the meeting of the Port Committee dated March 3, 1966, the committee agreed that there were 331 longshoremen with unused valid sponsorship privileges. The committee also agreed to accept applications for class B registration.

On June 15, 1967, at a meeting of the Port Committee, Respondent rejected an association proposal that the Association pick 150 applicants for class B registration, and that it be narrowed down between them to 200. At that meeting, Jerry Plante, who was then president of Respondent, stated that Respondent would consider applicants only on the basis of the San Pedro formula. Plante was asked what he meant by the San Pedro formula and Plante answered that it was sponsorship. 4/

As indicated in the minutes of the meeting of the Coast Committee, dated January 11, 1968, the use of

sponsorship as a criteria in considering applications for class B registration in any port was outlawed by the Coast Committee on November 23, 1965. The minutes further indicate that the Port Committee was instructed by the Coast Committee to proceed with registration of class B longshoremen under the applicable rules.

Walter A. Niemand was a member of the Association's labor relations department in 1968. He prepared the Association's list of proposed class B registrants. The Association reviewed the applications of 1,036 persons and used an eligibility system based on such items as work and educational background. The Association narrowed down the list to 475 men. Niemand was present at a meeting of the Port Committee on February 2, 1968. He credibly testified the following incidents took place. President Jerry Plante, Secretary-Treasurer Jack Godfrey, Business Agent Bill Rivera, and Pete Velasque, whose position with the Respondent, if any, was unknown, were all spokesmen for Respondent. A Mr. MacEvoy, who was an area manager of the Association, said that it was his understanding that the Respondent's membership had voted reuse of sponsorship. One of the four spokesmen for Respondent answered that that was the position of the members and spoke of the San Pedro formula involving sponsorship. MacEvoy said the Association would be unable to go along. Another one of the spokesmen for Respondent said that the union advisory committee would only be allowed to submit names of those men who had a sponsor and they could not

entertain individuals other than those. Respondent President Plante said that Respondent felt that sponsorship was legal and could be used in the selection of registrants. 5/

The dispute as to the registration of additional class B longshoremen was presented to Arbitrator George Love who on March 10, 1968, issued a decision which in part found that Respondent was trying to use sponsorship as a requirement in the joint registration process and that such use of sponsorship constituted a violation of the contract. The arbitrator went on to order the Port Committee to register 400 class B longshoremen without the use of sponsorship. The order called for the immediate registration of 60 applicants who had been mutually agreed to in a special meeting of the Port Committee in 1967, the interview of 186 applicants who appeared on both the Association's and Respondent's lists, and the processing of an additional group to total 400 class B longshoremen without resorting to any unilateral selection (sponsorship).

At a meeting of the Port Committee on October 2, 1968, Respondent submitted to the Association a list of 254 names with the demand that the persons named on the list be immediately registered as class B longshoremen. 6/ Next to each name on the list was the name of a sponsor. All of the sponsors were members of Respondent. Respondent admitted in its amended answer that all class A registrants are members of Respondent. Although Respondent President Johnston testified that

anyone can recommend an applicant, he later admitted that in 1966 the only persons who could make recommendations were members of Respondent and that there had been no change since. I credit the admission.

Johnston further testified that the 1951 cutoff date in the sponsorship system was used because many Negros [sic] had become members of Respondent during the years 1948 through 1951 and Respondent wanted them to have the same rights as other groups. However, a comparison of the list of persons eligible to sponsor as set forth in the minutes of the Port Committee meeting of March 3, 1966, with the names of the sponsors and applicants actually presented by Respondent to the Association on October 2, 1968, sheds much doubt of Johnston's credibility. Of the 254 names of sponsors contained in Respondent's list of proposed registrants, only approximately 75 of the sponsors appeared on the list of those who were eligible to sponsor. Thus it appears that Respondent is attempting to use a much broader system of sponsorship than would be indicated by eligibility standards set up by Respondent.

As reflected in the minutes of the meeting of the Port Committee dated October 9, 1968, on that date the Association proposed that the committee abide by the Coast Committee's minutes and the arbitrator's award and register 400 class B longshoremen without regard to sponsorship. The Respondent took the proposal under advisement. Since that time there has been no registration of class B longshoremen.

Respondent President Johnston testified without contradiction that Respondent and the Association had discussed the registration of 400 additional class B longshoremen if a container freight agreement was reached, but such an agreement had not been arrived at. The container agreement was to deal with the stuffing and stripping of packing and unpacking of containers.

3. The application of James Phillips.

James Phillips was a casual longshoreman who filled out an application for class B registration in June 1967. On February 20, 1969, he had a conversation with Respondent Secretary-Treasurer John Godfrey about the application. Arthur Miller, another casual longshoreman, was also present. Miller started the conversation by telling Godfrey that he had a sponsor available, a longshoreman named Luther Anderson. Godfrey told him that Anderson could not sponsor him as Anderson had already sponsored someone else. Phillips then asked Godfrey what consideration would be given to his (Phillips') application. Godfrey asked if he had a sponsor and Phillips answered that he didn't know he needed one. Godfrey replied, "everybody knows you have to have a sponsor. . . . You don't have a sponsor so I can't very well tell you what to do about it, but there will be some applications out in the near future. I can't say when, but you better fill out one and get a sponsor in the meantime." Thereafter, applications were distributed

for membership in the Union as terminal warehousemen but none were made available for application for class B registration. 7/

4. Conclusions as to the sponsorship practice.

I conclude from the above findings that Respondent, in the selection of class B registrants, has required and continues to require applicants to be sponsored by class A longshoremen or members of Respondent, as alleged in the complaint. As already noted, Respondent in its amended answer admitted that all class A longshoremen were members of Respondent.

Respondent contends that the complaint must be dismissed under Section 10(b) of the Act because the allegedly unlawful conduct occurred more than 6 months before the filing of a charge. I find this allegation without substance. Godfrey's statements to Phillips and Miller, as set forth above, establish that as of February 20, 1969, Respondent required sponsorship. That date would clearly be within the timely period for the filing of the charges. It is also clear that events occurring prior to the 10(b) period may be considered as background to give meaning to a subsequent event. See Houston Maritime Association, Inc., 168 NLRB 615 and cases cited therein.

Consideration must now be given to the question of whether such a sponsorship requirement violated the Act.

C. Analysis and Conclusions

1. The duty of fair representation.

a. The evolution of the doctrine.

The duty of fair representation was first enunciated by the United States Supreme Court in a 1944 case of Steele v. Louisville and Nashville Railroad Company, 323 U.S. 192, which arose under the Railway Labor Act. In that case a union which had, pursuant to that act, authority to bargain as the exclusive representative of a class of railway employees took action to prevent Negroes from holding certain jobs. The Supreme Court held, in substance, that the same statute which gave the union the right to act as the exclusive bargaining agent for all members of the craft inherently required the union to represent nonunion or minority members in the craft fairly, impartially, and in good faith. The Court found that the usual judicial remedies of injunction and damages were appropriate for a breach of such a duty. 8/

In Ford Motor Co. v. Huffman, 345 U.S. 330 (1953), the United States Supreme Court applied the same logic to a union whose status as an exclusive bargaining agent derived from the National Labor Relations Act. In that case the Court looked into the union's handling of the seniority of returning veterans and set forth the criteria that a union must follow, saying "a wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in

the exercise of its discretion." Cf. International Typographical Union, Columbus Typographical Union No. 5, AFL-CIO The Dispatch Printing Co., 177 NLRB 855.

The Supreme Court reiterated this concept of fair representation as applied to a union whose authority stems from the National Labor Relations Act in the case of Humphrey v. Moore, 375 U.S. 335 (1964). In that case the union had integrated seniority lists and an action for breach of contract had been brought under Section 301 of the Act. The Court said: "By choosing to integrate seniority lists based upon length of service at either company, the union acted upon wholly relevant considerations not upon capricious or arbitrary factors. The evidence shows no breach by the union of its duty of fair representation."

Though all of the Supreme Court cases cited above held that a union which exercises authority as an exclusive bargaining agent pursuant to statute has a concomitant duty to represent fairly all of the employees for whom it bargains, none of them deal with the question whether a breach of that duty violated any of the unfair labor practice sections of the Act. The Board addressed itself to this question in Miranda Fuel Company, Inc, 140 NLRB 181, enforcement denied 326 F.2d 172 (C.A. 2). In that case the Board found that a union caused an employer to reduce an employee's seniority status in a manner that violated their collective-bargaining contract. The Board held that the duty of a statutory representative to represent all employees in

the bargaining unit had to be viewed in the context of the right guaranteed employees by Section 7 of the Act "to bargain collectively through representatives of their own choosing." The Board then held:

> Section 7 thus gives employees the right to be free from unfair or irrelevant or invidious treatment by their exclusive bargaining agent in matters affecting their employment. This right of employees is a statutory limitation on statutory bargaining representatives, and we conclude that Section 8(b)(1)(A) of the Act accordingly prohibits labor organizations, when acting in a statutory representative capacity, from taking action against any employee upon considerations or classifications which are irrelevant, invidious, or unfair.

The Board further held that a union violated Section 8(b)(2) of the Act where its failure to represent employees fairly adversely affected the employment status of an employee, saying:

> . . .[W]e further conclude that a statutory bargaining representative and an employer also respectively violate Section 8(b)(2) and 8(a)(3) when, for arbitrary or irrelevant reasons or upon a basis of an unfair classification, the union attempts to cause or does cause an employer to derogate the employment status of an employee.

In essence the Board held that where a union causes an employer to adversely affect an employee's employment status in such a manner that no legitimate employer or union purpose is served, that the foreseeable result in [sic] an unlawful encouragement of union membership. Thus, where an employer bows to a union demand that an employee's employment status be derogated, and that demand serves no legitimate employer or union purpose and is therefore invidious and unfair, the employer has discriminated in regard to hire or tenure of employment or terms and conditions of employment and in the process has encouraged membership in a labor organization within the meaning of Section8(a)(3) of the Act. It is a violation of 8(b)(2) of the Act for a union to attempt to cause an employer to discriminate against an employee in violation of Section 8(a)(3), whether or not that attempt is successful.

In the Miranda case the Board found that the union did violate 8(b)(1)(A) and (2) of the Act and that the employer violated Section 8(a)(1) and (3). Though the Court of Appeals for the Second Circuit refused to enforce the Miranda decision, a majority of that court did not rule on the question whether a breach of the duty of fair representation was an unfair labor practice.

The Board has consistently followed the doctrine that it laid down in its Miranda decision. In Hughes Tool Company, 147 NLRB 1573, if [sic] held that a union's refusal to entertain the grievance of an employee because of that employee's race was a violation of

Section 8(b)(1)(A), (2), and (3) of the Act. In Local 1367, International Longshoremen's Association, AFL-CIO (Galveston Maritime Association), 148 NLRB 897, enfd. 368 F.2d 1010 (C.A. 5), it held that union-inspired work quotas based on race violated Section 8(b)(1)(A), (2), and (3) of the Act. [9]

In Local Union No. 12, United Rubber, Cork, Linoleum & Plastic Workers of America, AFL-CIO (Goodyear), 150 NLRB 312, enfd. 368 F.2d 12 (C.A. 5), the Board continued to follow its Miranda doctrine and found that a union violated Section 8(b)(1)(A), (2), and (3) of the Act by failing to process grievances relating to plant facilities which were segregated on the basis of race. In enforcing the Board's order the Fifth Circuit Court of Appeals agreed that a breach of a union's duty of fair representation did constitute an unfair labor practice under the Act.

The Board has also held that a union's breach of the duty of fair representation as applied to the operation of hiring halls constitutes violations of Section 8(b)(1)(A) and (2) of the Act. In Cargo Handlers, Inc., 159 NLRB 321, the Board found that a union violated Section 8(b)(1)(A) and (2) of the Act by running its hiring hall in such a way that Negroes were discriminated against. In Houston Maritime Association, Inc., supra, the Board similarly found a violation of 8(b)(1)(A) and (2) of the Act where a union refused to take all registrations at its hiring hall in order to prevent Negroes from using the hall. In effect

the union had created a pool of white employees with preferred status. Even though this "freeze" on registration had begun more than 6 months prior to filing of the charge, the Board held that the union had within the 10(b) period breached its duty of fair representation and therefore violated Section 8(b)(1)(A) and (2) of the Act. In reaching its conclusion, the Board specifically held that the obligation of fair representation extended to applicants for employment. 10/

Though the Supreme Court has not as yet specifically ruled on the question of whether a union's breach of the duty of fair representation constitutes a violation of the unfair labor practice sections of the Act, the high Court's language in the case of Vaca v. Sipes, 386 U.S. 171 (1967) indicates that the Miranda doctrine is in tune with the Court's thinking. The Vaca case presented a preemption question where state courts had asserted jurisdiction over a union's allegedly arbitrary failure to process a grievance to arbitration. The high Court found that the state courts did have concurrent jurisdiction but that a failure to represent fairly had not been proved. In reaching this conclusion the Court reviewed the history of the Miranda doctrine in detail, tying that doctrine into the flow of cases dealing with the duty of fair representation which started under the Railway Labor Act. Rather than indicating disagreement with the Board, the Court commented on the failure of the Board to adopt a Miranda doctrine at an earlier date by referring to "the NLRB's tardy assumption of jurisdiction in the

cases. . . ."

b. The criteria to be applied and conclusions.

The cases cited above all used language such as "unfair," "invidious," or "arbitrary" in describing the type of union conduct which was to be limited. Equally broad language is used in describing the extensive area of discretion that a union has in performing its legitimate functions. In essence, the union's actions with regard to employees on whose behalf it bargains must bear a reasonable relationship to its function as either the bargaining agent or as a labor organization. Under the Miranda case no such reasonable relationship is present when a union causes an employee's seniority to be reduced in violation of a contract. Under many of the other cases cited no such reasonable relationship is existent where a union uses racial criteria to affect employment status. The question presented in this case is whether such a reasonable relationship exists where a union requires a system of sponsorship as set forth above.

The sponsorship system results in two classes of applicants for employment. There are those applicants who know a class A registrant, all of whom are members of a union, who are willing to act as sponsors and those applicants who do not know such persons. A sponsorship system has more the ring of an archaic social club than of a labor organization. The labor organization is an important institution within our society that has substantial powers that affect the economic well being of

the employees that it represents. These powers are sanctioned by a statute and there is an obligation as described in many of the cases cited above for labor organizations to exercise these powers responsibly. Respondent, by giving access to work (registration) to some applicants because they happen to know a union member and by denying such access to others because they had not had the occasion to meet a union member who would sponsor them, is patently classifying applicants on an arbitrary basis. As noted above, Respondent did not call any witnesses and the only evidence attempting to justify the use of the sponsorship system is that of Respondent President Johnston who testified under Rule 43(b) of the FRCP when called by the General Counsel. Johnston's assertion that the sponsorship system was preserved in limited form so as to give certain employees, a large percentage of whom were Negroes, the same rights that other union members had enjoyed, has a very hollow ring. As indicated above, the group of class A registrants who were eligible to sponsor under Respondent's own interpretation of the sponsorship system were not in large measure the same group who were actually used for sponsors in the last list of applicants given to the Association by Respondent. Johnston seems to imply that the use of sponsorship by Negroes will cause other Negroes to become class B registrants. However, this is not a case of union-caused preferential hiring of Negroes and the social and legal implications of such a defense therefore need not be considered. Johnston's innuendoes

in his testimony in this direction are so vague that they cannot support any findings of fact. In short there is no showing that the sponsorship system has anything to do with any racial problem. Respondent offers no other evidence which even remotely ties in the sponsorship requirements to any legitimate function that it has as a bargaining representative or labor organization.

I find the sponsorship system as described above to be arbitrary and unfair. Respondent has the duty to refrain from such conduct where it adversely affects the employment status of employees and applicants for employment on whose behalf it bargains. In these circumstances I find that Respondent's requirement that the sponsorship system be used violates Section 8(b)(1)(A) and (2) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent set forth in section III, above, occurring in connection with the Association's operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy.

Having found that the Respondent has engaged in

certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent requires applicants for class B registration with the hiring hall be sponsored by class A registrants or members of Respondent, and having further found that such sponsorship system is in violation of Section 8(b)(1)(A) and 8(b)(2) of the Act, I shall recommend that Respondent cease and desist from requiring the use of the sponsorship system.

It is axiomatic that remedies for unfair labor practices must be tailored to correct in a meaningful way the effects of the unlawful activity. In some situations a cessation of the unlawful practice is sufficient, but the pragmatic facts of each individual case must be considered. I have found that Respondent has unlawfully refused to consider for registration any unsponsored applicant. However, I cannot determine from an evaluation of the record how many applicants would have been registered or who those registrants would have been if the unfair labor practice had not occurred. Any attempt to supply the number or names would be pure conjecture. An arbititrator [sic] on March 10, 1968, concluded that 400 applicants should be registered. However, he was not dealing with an unfair labor practice problem. The number of class B registrants is a matter which should be decided in collective bargaining between Respondent and the Association or through machinery set up by them. Though there is no allegation

in the complaint that Respondent has unlawfully refused to bargain, I believe that any effective remedy for the unlawful sponsorship system would require that Respondent be ordered to bargain upon request with the Association as to the number of applicants to be registered as class B longshoremen and, if an agreement is reached on that issue, to proceed with the registration on a nondiscriminatory basis without the use of sponsorship. I shall so recommend.

However, even this remedy will not adequately remedy the unfair practice. Bargaining as to the number of class B registrants that are needed on the longshore must take into consideration the amount of work that is available. Respondent has succeded [sic] in bending the hiring hall operation so that from its point of view no additional registrants are needed. The uncontroverted evidence [11] establishes that warehousemen who are members of Respondent are referred for work from the hiring hall after class B registrants and before casual longshoremen. Though this preferential treatment of warehousemen is not alleged in the complaint nor found by me in this decision to be a violation of the Act, continuation of this practice places Respondent in a position where it can indefinitely continue to bar nonsponsored applicants from registration. It is unlikely that an nonsponsored applicants will ever receive registration as class B longshoremen while union member warehousemen are freely used as an extension to currently registered class B longshoremen's hiring list. The use of the

warehousemen in this way is not sanctioned by the contract and Respondent did not come forward with any explanation of its actions. This preference afforded warehousemen prevents the remedy from being effective and therefore I shall recommend that Respondent cease and desist from causing or atttempting to cause warehousemen to be given preferential hiring treatment. If the individual warehousemen who want to work as longshoremen can meet nondiscriminatory standards, they can apply for class B registration along with the other applicants. If these warehousemen are not selected as class B registrants, they can be treated upon a nondiscriminatory basis the same as any casual longshoremen.

Upon the basis of the foregoing findings of fact and the entire record in this case, I make the following:

CONCLUSIONS OF LAW

1. The Association and its employer-members are engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Respondent is a labor organization within the meaning of Section 2(5) of the Act.

3. By requiring that applicants for registration as class B longshoremen be sponsored by class A registrants or members of Respondent, Respondent violated Section 8(b)(1)(A) and (2) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning

of Section 2(6) of the Act.

[Recommended Order omitted from publication.]

FOOTNOTES

1/ Member Fanning joins in the finding of a violation herein solely on the ground that the Union's unlawful conduct was related to union considerations more specifically, the Union's practice in requiring applicants for class B registration to be sponsored by class A union members discriminatorily precluded a class of employees—those unable to obtain such sponsorship—from receiving employment through the Union's exclusive hiring hall by the imposition of a union-oriented criterion. See opinions of Chairman McCulloch and Member Fanning in Hughes Tool Company, 147 NLRB 1573; Miranda Fuel Co., Inc., 140 NLRB 181.

TRIAL EXAMINER'S DECISION FOOTNOTES

1/ All dates are in 1969 unless otherwise specified.

2/ The record discloses a great number of errors in transcription. However, in the absence of a motion to correct the record and based on my opinion that the errors are either self-correcting because of their context or that they occur with regard to matters which are not necessary for the resolution of the issues in this case, no action is taken with regard to the transcript.

Respondent in its brief states that G.C. Exh. 11 was not received in evidence. As indicated at p. 214, ll. 22-23, that assertion is in error.

3/ This finding is based on the admission of Curt Johnston, president of Respondent. Though Respondent did not call any witnesses and rested on the close of the General Counsel's case, Johnston did testify pursuant to Rule 43(b) of the Federal Rules of Civil Procedure when called as a witness by the General Counsel.

4/ These findings are based on the uncontradicted testimony of Robert R. McLean, labor relations administrator for the Port Committee.

5/ Respondent argued at the hearing that the agency of Velasque had not been established and that the specific spokesman for Respondent had not been identified for each statement made. In the circumstances of these conversations, I find that statements made by any of the four spokesmen for Respondent were binding on Respondent. The president of the Union, as well as two other officials, were present at the meeting and they in effect ratified any statements that Velasque may have made by not questioning such statements. Respondent President Plante's remark that sponsorship was lawful made it clear what Respondent's position was.

6/ Respondent President Curt Johnston testified that the list was supposed to have contained 186 names but that the others were added accidentally. The minutes of the October 9, 1968, meeting of the Port Committee also indicate that the Union intended the list to contain 186 names and that a new list would be submitted.

7/ These findings are based on the credited testimony of Phillips. As noted above, Respondent did not call any witnesses and Godfrey did not take the stand. Arthur Miller also testified as to what was said at this conversation and in general terms corroborated Phillips' testimony concerning the need for a sponsor. However, Miller was an extremely confused witness and my observation of him as he testified leads me to the conclusion that he was not aware of the distinction between registration as a class B longshoreman and an application for membership in Respondent as a terminal warehouseman. Subsequent to this conversation Miller was admitted membership in the Union as a terminal warehouseman and since that time he has been dispatched on a regular basis for longshoreman's work.

8/ In the same vein see Tunstall v. Brotherhood of Locomotive Firemen and Enginemen, 323 U.S. 210.

9/ Though in both these cases the Board found that the union violated 8(b)(3) of the Act, no consideration will be given in this decision to whether a failure of a union to a [sic] fairly represent employees constitutes an

unlawful refusal to bargain. There is no such allegation in the complaint. In addition see Houston Maritime Association, Inc., supra, where the Board did not adopt the Trial Examiner's alternate conclusion that a breach of the union's duty of fair representation violated Section 8(b)(3) of the Act, holding that it was unnecessary to consider and decide that question for the purpose of arriving at a decision in that case.

10/ It has long been established that applicants for employment are entitled to the protections of the Act. Phelps Dodge Corp. v. N.L.R.B., 313 U.S. 177.

11/ Based on the testimony of Frank Aguilar, the chief dispatcher of the hiring hall and an elected official of Respondent.

NLRB v. LONGSHOREMEN (ILWU), LOCAL 13 (Pacific Maritime Assn.)

U.S. Court of Appeals Ninth Circuit (San Francisco)

NATIONAL LABOR RELATIONS BOARD v. INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, LOCAL No. 13, No. 71-1514, April 19, 1972.

Application for enforcement of an order of the NLRB (74 LRRM 1532, 183 NLRB No. 28). Case remanded to Board.

Before DUNIWAY and HUFSTEDLER, Circuit Judges, and FERGUSON, District Judge.

PER CURIAM: The National Labor Relations Board, pursuant to the National Labor Relations Act, as amended, 29 U.S.C. §151, et seq., has applied for the enforcement of an order against the International Longshoremen's and Warehousemen's Union, Local No. 13. The Board found that the union committed unfair labor practices in violation of sections 8(b)(1)(A) and 8(b)(2) of the Act by requiring that each applicant for registration as a Class B longshoreman must be sponsored by a Class A longshoreman. Specifically, the Board found that the union's sponsorship program was an arbitrary and unfair method of selecting longshoremen for Class B

registration and was in violation of the union's duty of fair representation under section 9 of the Act. Breach of the duty of fair representation, the Board argues, constitutes an unfair labor practice under section 8(b)(1)(A). The Board further found that the sponsorship system violated section 8(b)(2) by causing or attempting to cause the employer, in this case the Pacific Maritime Association, to discriminate against non-sponsored applicants for Class B status.

The court must remand the case to the Board for additional findings and conclusions to clarify its decision.

The Board does not contend that union sponsorship programs are unlawful per se. It contends, however, that the program involved here is unlawful on its face. Yet the order which the Board seeks to have enforced prohibits any type of sponsorship program.

The difficulty which faces the court is having a record which does not set forth with specificity (1) the actual operation of the sponsorship program and (2) the effect of the program.

With reference to the operation of the program, the Board found that of the 254 names of sponsors contained in the union's list of proposed Class B registrants presented to the employer (Pacific Maritime Association) on October 2, 1968, only 75 of the sponsors appeared on the list of persons eligible to sponsor. The Board concluded from this that "it appears that [the union] is attempting to use a much broader system of sponsorship than would be indicated by eligibility standards set up by

the [union]."

The record is not clear what type of sponsorship program was actually in operation. No findings were made with regard to the 179 sponsors who did not appear eligible under the union's posted eligibility criteria for sponsors.

It is undoubtedly for that reason the Board, at oral argument before this court, took the position that the posted sponsorship program of the union is unlawful per se. The difficulty with that position is again having an incomplete record upon which this court can make a judgment.

For example, the trial examiner concluded, with reference to the motivation of the program, that "there is no showing that the sponsorship system has anything to do with any racial problem". Yet that finding does not answer the question whether the program itself has an unlawful racial impact.

The issues presented by the litigation are far-reaching, and their determination will have a significant impact upon labor-management relations. The sponsorship program may have the effect of creating a "closed shop," impermissibly cause discrimination between union and non-union workers seeking employment, impermissibly encourage union membership and generally violate the provisions of the National Labor Relations Act. However, based upon the record before it, this court cannot make such determinations. The court must call upon the expertise of the Board for an augmentation of

the record.

Under these circumstances, remand to the Board for more detailed and comprehensive findings and conclusions is proper. See NLRB v. Metropolitan Life Insurance Co., 380 U.S. 438, 58 LRRM 2721 (1965); Textile Workers Union of America v. Darlington Manufacturing Co., 380 U.S. 263, 58 LRRM 2657 (1965); NLRB v. Virginia Electric & Power Co., 314 U.S. 469, 9 LRRM 405 (1941); NLRB v. Austin Power Co., 350 F.2d 973, 60 LRRM 2145 (6th Cir. 1965); NLRB v. United Furniture Workers of America, 337 F.2d 936, 57 LRRM 2347 (2nd Cir. 1964).

It is, therefore, ordered that the action is remanded to the Board for such proceedings, findings, recommendations and orders as may be required pursuant to the Board's discretion under the law with reference to the matters presented in this order and any other matters which the Board may deem relevant to the litigation.

If any additional proceedings are instituted in this court in connection with any new determination which the Board may make, then the court will reach the conclusion required of it upon consideration of the record and briefs on file and such supplemental records and briefs as may be submitted and upon this same docket.

192 NLRB No. 50

International Longshoremen's and Warehousemen's Union, Local No. 13 (Pacific Maritime Association) and James Phillips, International Longshoremen's and Warehousemen's Union

Local No. 13 and Pacific Maritime Association.
Cases 21-CB-3457 and 21-CB-3494

July 28, 1971

DECISION AND ORDER

By Chairman Miller and Members Fanning and Jenkins

On October 30, 1970. Trial Examiner Maurice Alexandre issued his Decision in the aboveentitled consolidated proceeding finding that the Respondent had engaged in and was engaging in certain unfair labor practices within the meaning of the National Labor Relations Act, as amended, and recommending that it cease and desist therefrom and take certain affirmative actions, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent and Charging Party Pacific Maritime Association filed exceptions to the Trial Examiner's Decision and supporting briefs. Charging Party Pacific Maritime Association also filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this proceeding to a three-member

panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, and the entire record in this proceeding [1] and hereby adopts the findings, conclusions, and recommendations [2] of the Trial Examiner as modified herein.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Trial Examiner as modfified below and hereby orders that Respondent International Longshoremen's and Warehousemen's Union, Local No. 13, its officers, agents and representatives, shall take the action set forth in the Trial Examiner's recommended Order as herein modified:

Substitute the following for paragraph 1(d) of the Trial Examiner's recommended Order.

"(d) Refusing to bargain in good faith with Pacific Maritime Association by insisting that applicants for Class B registration be sponsored by members of Respondent or by former members with a withdrawal card, or by attempting to obtain class B registration preference for its members, or by unilaterally changing any of the terms or conditions of employment relating to registration or

dispatch of longshoremen at the port of Los Angeles-Long Beach."

TRIAL EXAMINER'S DECISION

MAURICE ALEXANDRE, Trial Examiner: this case was heard in Los Angeles, California, on February 18, 19, 24, April 7, and June 16, 1970, upon a complaint issued on October 31, 1969, [1] and upon a further complaint issued on December 3, 1969, [2] both of which were consolidated by an order issued on the latter date by the Regional Director. The consolidated complaints alleged that Respondent had violated Section 8(b)(1)(A), (2), and (3) of the National Labor Relations Act, as amended. Respondent's answer denied commission of the unfair labor practices alleged.

Upon the entire record, [3] my observation of the witnesses, and the briefs filed by the General Counsel, Respondent, and PMA, I make the following:

FINDINGS AND CONCLUSIONS [4]

I. The Unfair Labor Practices

A. The Evidence

The facts are essentially undisputed. [5] PMA is an association which acts as collective-bargaining representative for employer-members engaged in shipping, stevedoring, and terminal operations on the Pacific Coast, including the Port of Los Angeles-Long Beach. PMA and

Respondent's parent organization, herein called the International, are, and at all times have been, parties to a collective-bargaining agreement which is binding upon Respondent. Among other things, the agreement provides that all men shall be dispatched to longshore jobs through hiring halls operated by a joint port labor relations committee for each port covered by the agreement. [6/] Such committees are made up of representatives of PMA and of the International, each side having equal voting power. Persons holding designated offices in Respondent are the International's representatives on the committee which operates the hiring halls at the Port of Los Angeles-Long Beach (hereafter called the Joint Port Committee).

Under the agreement, preference in dispatch to longshore jobs is given to registered longshoremen, i.e., first preference to class A or fully registered longshoremen, and second preference is given to class B or limited registered men. When no registered men are available to fill longshore jobs, unregistered man [sic] may be dispatched. The Joint Port Committee controls the registration lists, and has the power to make additions to, and deletions from, the lists. However, the men are dispatched by dispatchers who are elected by Respondent's membership.

Prior to 1965, "sponsorship," also referred to as the "San Pedro formula," had been used in selecting men for registration. A sponsor was a member of Respondent, or a former member with a valid withdrawal card, who

recommended the applicant for registration. In 1965, the Joint Coast Committee decided that the sponsorship system should be used during that year, but not thereafter. On December 20, 1966, the Joint Coast Committee authorized the Joint Port Committee to add 200 men to the class B registration list. Thereafter, the Joint Port Committee recieved [sic] applications from over 3,400 individuals interested in registration. The question of the methods to be used in selecting men for registration was first discussed by the Joint Port Committee on June 15, 1967. During the course of numerous meetings, Respondent insisted that sponsorship be used, PMA objected, and an impasse was reached. On March 25, 1968, the Joint Coast Committee authorized the Joint Port Committee to increase the number of class B registrants from 200 to 400. The registration dispute was ultimately submitted to arbitration. By an award dated March 10, 1968, the arbitrator decided, inter alia, that Respondent was in violation of the collective-bargaining agreement by insisting upon the use of sponsorship in awarding class B registration and, in effect, directed Respondent to discontinue such insistence. Respondent, however, refused to participate with PMA in implementing the award, and continued to insist upon sponsorship.

In late February 1969, Phillips, one of the charging parties herein, asked Godfrey, Respondent's secretary-treasurer, what consideration was being given to his

application for class B registration filed in June 1967. Godfrey asked Phillips whether he had a sponsor and, on receiving a negative reply, stated that everyone had to have a sponsor and that nothing could be done for Phillips until he obtained one. In May 1969, an unfair labor practice complaint was issued against Respondent, which resulted in a decision by the Board that Respondent had violated Section 8(b)(1)(A) and (2) of the Act by "requiring that applicants for registration as Class B longshoremen be sponsored by Class A registrants or members of" Respondent. Gatlin case, supra, fn.3.

Following the arbitration award of March 10, 1968, Respondent not only continued to insist upon the use of sponsorship in the selection of class B registrants, but it unilaterally changed the method of dispatching unregistered men to longshore jobs. Prior to that date, class A and B registrants were dispatched from the central dispatch hall, [7] and unregistered men were dispatched from a so-called casual hall and from "runner" locations. [8] On July 2, 1968, the Joint Port Committee decided to change the procedure for selecting all unregistered longshoremen for dispatch. The new plan provided that effective July 15, certain groups of men with experience in waterfront-related work would be given identification cards and would all be temporarily dispatched by rotation to longshore jobs from a new hall known as the "Dispatch Hall for Extra Longshore Work" (hereafter called the extra hall). [9]

From July 15 until some time in September 1968, this procedure was followed. However, in the early fall of 1968, Respondent unilaterally changed the procedure, as a result of which its dispatchers again began to dispatch strikers to longshore jobs from runner locations. [10] In addition, beginning in early January 1969, Respondent's dispatchers unilaterally began to dispatch certain other unregistered men, known as terminal warehousemen, to longshore jobs from the central hall instead of from the extra hall, as agreed. [11] These individuals were members of Respondent in a category of membership known as TW membership. [12] Prior to January 16, 1969, 41 TW members of Respondent were employed in terminal warehouse work. Between January 16 and September 6, 1969, additional terminal warehousemen were taken into membership by Respondent, so that on the latter date, there were approximately 635 such TW members. [13] The parties stipulated that Respondent added to the number of its TW members in 1969 "because of increases in terminal warehousemen's jobs, because of the hope that it would gain more terminal warehousemen's jobs and because of the impasse as to registration of longhshoremen." [14]

In January 1969, relatively few TW members were dispatched to longshore jobs from the central hall as compared with unregistered nonmembers dispatched to such jobs from the extra hall. During the ensuing months, however, the number of men dispatched from

the extra hall decreased, while the number of TW members dispatched from the central hall increased. On approximately half of the days in September and October, there were no dispatches to longshore jobs from the extra hall. Yet on the same days, a substantial number of TW members were dispatched from the central hall. 15/

In late September or early October 1969, representatives of PMA and Respondent met to discuss the impasse over the selection of class B registrants. McEvoy, the PMA representative, suggested that the parties consider a list of 475 applicants which had previously been prepared and presented by PMA. At the request of Johnson, Respondent's representative, PMA furnished a copy of the list a few days later. At another meeting late in October, Respondent proposed that all the men on the said list who had 100 or more hours of longshore work in 1969 should receive class B registration. Examination of the list 16/ discloses that the great bulk of those who worked 100 hours or more during the said period were TW members of Respondent. PMA rejected the proposal, stating:

> It was unacceptable from our point of view because the criteria of working experience on the waterfront during the year 1969 would obviously result in a discriminatory situation because of preference of employment which had been given starting in January of 1969 to a

> group of men who were working on the waterfront under what we call TW numbers, men who were terminal warehousemen who had been recruited by Local 13 who were not jointly registered longshoremen but who were members of [Local 13] and who were getting dispatch status out of the longshore dispatch hall.

On October 31, 1969, the use of the temporary extra hall ended because of an eviction notice received by the Joint Port Committee. Thereafter, Respondent's dispatchers dispatched unregistered men to longshore jobs only from the central hall or from runner locations. As a result, Respondent's TW members received the bulk of the dispatches as compared with other unregistered men. 17/

Thereafter, PMA and Respondent discussed registration matters on a number of occasions, but prior to February 12, 1970, Respondent refused to participate in implementation of the arbitrator's award which, as noted above, had directed it to discontinue its insistence upon the use of sponsorship in selecting men for class B registration. However, on the latter date, i.e., after the complaints herein had been issued and 6 days before the hearing began, Respondent's membership voted to implement the award.

B. Concluding Findings

1. A summary of the undisputed facts shows the following: the collective-bargaining agreement to which Respondent has been bound provides for the dispatch of men to longshore jobs solely through hiring halls. The halls are operated by a Joint Port Committee, which has sole authority to change dispatch procedures. However, dispatches are made by dispatchers elected by Respondent's members. Class A and B registrants are entitled to be dispatched to available longshore jobs before unregistered men, and all eligible unregistered men are dispatched in rotation to the remaining jobs.[18/] Prior to January 1969, registered men were dispatched from the central hall, and unregistered men were dispatched from the extra hall. In the early part of that month, Respondent began to increase the number of its TW members, who were eligible for dispatch to longshore jobs as unregistered men. At the same time, Respondent unilaterally began to dispatch its TW members from the central hall instead of from the extra hall as agreed. Thereafter, the number of TW members so dispatched continued to increase steadily, while the number of unregistered nonmembers dispatched from the extra hall continued to decrease. Following the closing of the extra hall in October 1969, Respondent's TW members received the bulk of the dispatches given to unregistered men.

These facts, at the very least, create a presumption

consequence, it was necessary to fill longshore jobs with a larger number of unregistered men than would have been dispatched had the class B registration list been augmented.

In January 1969, although the amount of available terminal warehouse work was limited,[20/] Respondent began to increase the number of its TW members by admitting to membership only applicants who were sponsored by a member of Respondent. Such increase in TW membership was admittedly motivated in part by the impasse relating to class B registration. At the same time, as found above, Respondent unlawfully began to give dispatch preference to its TW members over unregistered nonmembers, thereby enabling the former to obtain more longshore experience than the latter. When the Joint Port Committee met in late September or early October 1969 to discuss the impasse in class B registration, PMA suggested consideration of a list of 475 applicants which it had prepared. Respondent, however, sought to capitalize upon the longshore experience obtained by its TW members through its unlawful conduct. It proposed that class B registration be given to those on the list who had 100 or more hours of longshore work in 1969. Such proposal would have resulted in according class B registration preference, and hence dispatch preference, to Respondent's TW members over nonmembers, since the great bulk of the men on the list who satisfied the proposed criterion were TW members. Although PMA rejected such a preferential proposal,

consequence, it was necessary to fill longshore jobs with a larger number of unregistered men than would have been dispatched had the class B registration list been augmented.

In January 1969, although the amount of available terminal warehouse work was limited, [20/] Respondent began to increase the number of its TW members by admitting to membership only applicants who were sponsored by a member of Respondent. Such increase in TW membership was admittedly motivated in part by the impasse relating to class B registration. At the same time, as found above, Respondent unlawfully began to give dispatch preference to its TW members over unregistered nonmembers, thereby enabling the former to obtain more longshore experience than the latter. When the Joint Port Committee met in late September or early October 1969 to discuss the impasse in class B registration, PMA suggested consideration of a list of 475 applicants which it had prepared. Respondent, however, sought to capitalize upon the longshore experience obtained by its TW members through its unlawful conduct. It proposed that class B registration be given to those on the list who had 100 or more hours of longshore work in 1969. Such proposal would have resulted in according class B registration preference, and hence dispatch preference, to Respondent's TW members over nonmembers, since the great bulk of the men on the list who satisfied the proposed criterion were TW members. Although PMA rejected such a preferential proposal,

Respondent continued to insist upon the use of sponsorship in selecting men for class B registration until February 12, 1970.

Upon these facts, I find that Respondent continued until February 12, 1970, to engage in the same conduct found unlawful in the Gatlin case, i.e., its insistence upon the use of sponsorship in connection with class B registration. I further find that Respondent's entire course of conduct constituted a manuever to obtain class B registration preference, and hence dispatch preference, for its TW members over other applicants for registration who did not desire or were unable to obtain TW membership; and that by such maneuver Respondent prevented nonmembers from obtaining class B registration, and thus employment, prior to February 12, 1970. Such conduct violated Section 8(b)(1)(A) and (2) of the Act. Cf. International Union of United Brewery Workers, Local No. 8 (Considine Distributing Co.), 166 NLRB 915.

Finally, I find that by unlawfully insisting upon the use of sponsorship in class B registration and by unlawfully attempting to obtain class B registration preference for its members, Respondent created and perpetuated an impasse in its negotiations with PMA until Respondent abondoned [sic] its illegal conduct on February 12, 1970. By such conduct, Respondent was guilty of a refusal to bargain, thereby violating Section 8(b)(3) of the Act. Cf. Muskegon Bricklayers Union No. 5, etc., 152 NLRB 360, 366, mod. 378 F.2d 859 (C.A. 6); cf. also Bricklayers & Masons International Union Local No. 3, 162 NLRB

476. 21/

3. The cases cited above refute the contention by Respondent that its conduct was not the type of conduct which Congress intended to reach by Section 8(b)(1)(A) and (2). Equally without merit is the contention that a violation of that section has not been established because the record fails to show unlawful discrimination in respect of dispatch or registration toward any specific applicant for employment or for registration. A finding that such section has been violated is not precluded where, as here, the record establishes a pattern of unlawful discrimination in favor of members as a group and against nonmembers as a group. 22/

4. The charge relating to the unlawful dispatches was filed on September 15, 1969. Respondent contends that there is no evidence of any such violation within the 6 months preceding that date, i.e., after March 15, 1969; and that if any violation occurred before the latter date, it is time-barred by Section 10(b) of the Act. I disagree. The record establishes that throughout 1969, Respondent continued to give dispatch preference to its TW members over other unregistered men who were not members. Since it is apparent that such preference continued well after March 15, 1969, Section 10(b) does not bar a finding that the preference was unlawful.

The charge relating to Respondent's unlawful conduct involving registration was filed on November 3, 1969. Respondent contends that the decision in Local Lodge

No. 1424 v. N.L.R.B., 362 U.S. 411, unlawful conduct on its part committed prior to the limitations period, i.e., prior to May 3, 1969, cannot be used to taint conduct occurring within such period. The record shows that Respondent's course of conduct, which began with its insistence upon the use of sponsorship condemned in the Gatlin case and which later blossomed into the maneuver and refusal to bargain found herein to be unlawful, continued until February 12, 1970, i.e., long beyond the cutoff date. It follows that Section 10(b) does not bar a finding that the conduct in question was unlawful.

CONCLUSIONS OF LAW

1. By giving preference to its TW members over nonmembers in dispatching unregistered men to longshore jobs under its exclusive hiring-hall arrangement, as found herein, Respondent violated Section 8(b)(1)(A) and (2) of the Act.

2. By requiring that applicants for class B registration be sponsored by a member of Respondent or by a former member with a withdrawal card, as found herein, Respondent violated Section 8(b)(1(A) and (2) of the Act.

3. By engaging in a maneuver to obtain preference in class B registration for its TW members over nonmembers, thereby preventing the registration and subsequent dispatch of nonmembers on a nondiscriminatory basis, as found herein, Respondent violated Section 8(b)(1)(A) and (2) of the Act.

4. By unlawfully insisting upon the use of sponsorship

in class B registration, and by unlawfully attempting to obtain class B registration preference for its TW members, thereby creating and perpetuating an impasse in its negotiations with PMA until Respondent abandoned its illegal contract, Respondent violated Section 8(b)(3) of the Act.

THE REMEDY

I recommend that Respondent cease and desist from its unfair labor practices, [23] and that it take certain affirmative action necessary to effectuate the policies of the Act. Among other things, I recommend that Respondent exercise its dispatch authority in a nondiscriminatory manner, that it maintain records accurately and fully reflecting the basis on which each dispatch is made, and that such records be made available for inspection by the Regional Director or his agents. [24]

I further recommend that Respondent make whole all applicants for employment for any loss of earnings they may have suffered by reason of Respondent's discriminatory exercise of its dispatch authority in favor of its TW members from and after March 15, 1969, i.e., the beginning of the Section 10(b) limitations period. [25] Such loss of earnings shall be computed in accordance with the methods prescribed in F. W. Woolworth Co., 90 NLRB 289, and Isis Plumbing & Heating Co., 138 NLRB 716.

Finally, I recommend that upon request, Respondent

shall bargain in good faith with PMA respecting the registration of class B longshoremen; and that if agreement is reached, Respondent shall proceed with such registration on a nondiscriminatory basis.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended [sic]:

ORDER

Respondent, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Discriminating in favor of its members and against nonmembers in dispatching unregistered men to longshore jobs from hiring halls operated by the Joint Port Labor Relations Committee for the Port of Los Angeles-Long Beach.

(b) Attempting to obtain a preference in class B registration for its members over nonmembers.

(c) Preventing or attempting to prevent applicants who are not members of Respondent from obtaining class B registration.

(d) Refusing to bargain in good faith during negotiations with Pacific Maritime Association by insisting that applicants for class B registration be sponsored by members of Respondent or by former members with a withdrawal card, or by attempting to obtain class B

registration preference for its members, or by unilaterally changing any of the terms or conditions of employment, relating to registration or dispatch of longshoremen at the Port of Los Angeles-Long Beach, established pursuant to a collective-bargaining agreement executed by Pacific Maritime Association and International Longshoremen's and Warehousemen's Union.

(e) In any other manner restraining or coercing nonmembers in the exercise of their rights as employees under Section 7 of the Act.

2. Take the following affirmative action:

(a) Exercise its dispatch authority under its exclusive hiring hall arrangement in a nondiscriminatory manner.

(b) Maintain permanent records accurately and fully reflecting the basis on which each dispatch is made.

(c) Upon request of the Regional Director for Region 21, or his agents, make available for inspection at all reasonable times, all its records relating to the operation of its dispatch system.

(d) Make whole any and all applicants for employment for any loss of earnings they may have suffered by reason of Respondent's discriminatory exercise of its dispatch authority, to the extent and in the manner set forth in the Section entitled, "The Remedy."

(e) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all documents, records, and data, including those relating to registration and job dispatch, necessary to compute and

analyze the amount of backpay due under the terms of this Order.

(f) Upon request, bargain in good faith with Pacific Maritime Association respecting the registration of class B longshoremen; and if agreement is reached, proceed with such registration on a nondiscriminatory basis.

(g) Post in its business office, meeting halls, hiring halls, and other places where notices to members and applicants for employment are customarily posted by Respondent, copies of the notice attached hereto and marked "Appendix." [26] Copies of said notice, on forms provided by the Regional Director for Region 21, after being duly signed by a representative of the Respondent, shall be posted immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(h) Notify the Regional Director for Region 21, in writing, within 20 days from the receipt of this Decision, what steps have been taken to comply herewith. [27]

APPENDIX

NOTICE TO ALL MEMBERS
AND
APPLICANTS FOR EMPLOYMENT
POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

Pursuant to the Recommended Order of a Trial Examiner of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify you that:

After a trial at which all sides had a chance to give evidence, a Trial Examiner of the National Labor Relations Board has found that we violated the National Labor Relations Act, and has ordered us to post this notice.

WE WILL NOT discriminate in favor of our members and against nonmembers in dispatching unregistered men to longshore jobs.

WE WILL NOT attempt to obtain a preference in Class B registration for our members over nonmembers.

WE WILL NOT prevent or attempt to prevent nonmembers from obtaining Class B registration.

WE WILL NOT unilaterally change any of the terms of conditions of employment, relating to the registration or dispatch of longshoremen at the Port of Los Angeles-Long Beach, established pursuant to a collective-bargaining agreement between Pacific Maritime Association and International Longshoremen's and Warehousemen's Union.

WE WILL NOT in any other manner restrain or coerce nonmembers in the exercise of their rights as employees

under Section 7 of the Act.

WE WILL exercise our dispatch authority in a nondiscriminatory manner.

WE WILL keep permanent records which will accurately and fully disclose the basis on which each dispatch is made.

WE WILL, upon request of the Regional Director for Region 21 or his agents, make available for inspection, at all reasonable times, any records relating to the operation of our dispatch system.

WE WILL make any and all applicants for employment whole for any loss of earnings they may have suffered because of the discriminatory exercise of our dispatch authority.

WE WILL, upon request, bargain in good faith with Pacific Maritime Association respecting the registration of Class B longshoremen; and if agreement is reached, proceed with such registration on a nondiscriminatory basis.

INTERNATIONAL
LONGSHOREMEN'S AND
WAREHOUSEMEN'S UNION,
LOCAL NO. 13
(Labor Organization)

Dated By

(Representative)(Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive

days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its porvisions [sic], may be directed to the Board's Office, Eastern Columbia Building, 849 South Broadway, Los Angeles, California 90014, Telephone 213-688-5229.

FOOTNOTES

1/ Included in this proceeding is a 34-page stipulation, together with approximately 89 exhibits. In reaching its decision herein, the Board has considered the entire document and all exhibits attached thereto. The Trial Examiner's ruling granting the General Counsel's motion to strike certain portions of the stipulation is hereby reversed.

2/ In its exception Pacific Maritime Association requests that we eliminate a possible narrow interpretation of the Trial Examiner's recommended Order. We find merit in this exception.

TRIAL EXAMINER'S DECISION FOOTNOTES

1/ Based upon a charge filed on September 15, 1969, by James Phillips.

2/ Based upon a charge filed on November 3, 1969, by Pacific Maritime Association, hereafter called PMA.

3/ The exhibits received in evidence include, inter alia, the following: (a) Joint Exh. 1-a copy of certain pages of the transcript of testimony received in International Longshoremen's and Warehousemen's Union, Local No. 13 (Gatlin, Phillips and PMA), 183 NLRB No. 28 (hereafer referred to as the Gatlin case); and (b) Joint Exh. 2-a lengthy stipulation (with numerous attached exhibits) executed by the General Counsel, Respondent and PMA on May 25, 1970, providing that witnesses, if called, would testify under oath to the information set forth therein. Because of several changes to which the signers had agreed and, pursuant to their request, permission was given to submit a retyped copy of the stipulation in place of the one received in evidence. By letter dated June 23, 1970, such retyped copy was transmitted to me together with a corrected copy of Exh. S-80 attached thereto. It is hereby ordered that the said letter be, and it hereby is, received in evidence as

TX Exh. 8. It if [sic] further ordered that the retyped copy of the said stipulation and the corrected Exh. S-80 be, and they hereby are, respectively substituted in place of the documents received in evidence as Joint Exh. 2 and Exh. S-80 attached thereto.

At the hearing, I reserved ruling on Respondent's motion to strike Joint Exh. 1. The motion is denied.

In its brief, Respondent makes certain objection to, and/or motions to strike, numerous specified and unspecified exhibits received in evidence. No useful purpose would be served in reciting the voluminous reasons offered by Respondent with respect to such exhibits. I grant the motion to strike insofar as it applies to G.C.i Exh. 22(a) through 39. Those exhibits were offered in support of the General Counsel's motion to strike the answers herein, following the failure of Respondent's counsel of record to appear at a regularly scheduled hearing on April 7, 1970, despite the denial of Respondent's request for a further continuance to some time in May. Since the motion to strike the answers was thereafter withdrawn, the stricken exhibits are no longer immaterial. In all other respects, the objections are overruled and the motion to strike is denied.

4/ The complaint alleged, and the answers, by failing to deny, admitted facts which, I find, establish that PMA and its employer-members are employers engaged in commerce and in operations affecting commerce within the meaning of the Act. I further find that Respondent is a labor organization within the meaning of the Act.

5/ I find as facts the information which appears in par. 1 through 62, and in the first two sentences of par. 63, of the stipulation referred to as Joint Exh. 2. I grant the General Counsel's motion to strike the balance of the stipulation through the first paragraph of par. 77, together with the exhibits referred to therein, since these relate to matters that occurred after Februrary 12, 1970, and, therefore, are not material to any issue before me in this proceeding.

6/ The agreement also created a Joint Coast Labor

Relations Committee, which has coastwide jurisdiction to review decisions relating to the operation of the hiring halls.

7/ A small number of "commercial warehousemen" were also dispatched from the central halls. These are members of Respondent who work primarily in warehouse operations of employers who have collective-bargaining agreements with Respondent and who, on occasions when insufficient warehouse work is available, are dispatched to longshore work. They are not involved in this proceeding and no further reference to them is made in this decision.

8/ Runner locations are those where persons on strike in industries other than longshore congregate for the purpose of obtaining longshore jobs. For each such location, a representative of the striking union goes to the central hall where he is given dispatch slips.... He takes the slips to the runner hall and distributes them.

9/ The new procedure is set forth in Exh. S-13-A, attached to and referred to in par. 17 of Joint Exh. 2. Sec. 5 of the said exhibit states that all dispatches at the extra hall "shall be on a rotational basis."

10/ Since the General Counsel's brief (p.4) points out that the complaints herein do not attack that practice, no further reference is made thereto.

11/ Terminal warehousemen were employed in the performance of so-called terminal warehouse work under contracts between Respondent and certain warehousing companies. When not needed for work under these contracts, they could be dispatched as unregistered men to longshore jobs.

12/ Respondent created this category of membership during its organizational campaign which resulted in Respondent's certification in January 1968 as bargaining representative of the terminal warehousemen of some of the warehouse companies.

13/ Except for three or four individuals, each of those so added to TW membership was required to have, and had, a "sponsor", i.e., a member of Respondent who recommended the terminal warehouseman for membership. Before being accepted into membership, each was interviewed by Respondent's registration advisory committee, which considered about 2,000 applications before making its selections.

14/ During representative periods between January 1, 1969, and the execution of Joint Exh. 2 of May 25, 1970, about 80 TW members of Respondent were steadily employed in terminal warehouse work under contracts between Respondent and several companies. In addition, an average of about six extra TW members a day were employed in other terminal warehouse jobs covered by Respondent's contracts.

15/ Based on Exh. S-17, attached to and referred to in par. 23 and 34 of Joint Exh. 2.

16/ The list received in evidence as G.C. Exh. 41 showed the applicants' names, the number of hours worked by each during the first 9 months of 1969, and whether or not each was a TW member of Respondent.

17/ See fn. 15, supra.

18/ No claim is made by the General Counsel that such dispatch preference violated the Act.

19/ In that case, the Board found that there was no probative evidence in the record which would establish that the preferential dispatch of terminal warehousemen was directly related to Respondent's unlawful sponsorship requirement. The Board then added: "But we are not blind to the possibility of the utilization of various means to effectively preserve the practice of sponsorship herein declared unlawful." Such evidence is present in the record of the instant case and it is clear that the possibility posed by the Board became a reality.

20/ See fn. 14, supra.

21/ PMA contends that a violation of Respondent's duty to bargain in good faith is also shown by its pattern of delay and obstruction in carrying out its obligations as a member of the Joint Port Committee under the collective-bargaining agreement. The complaint does not allege a violation of Section 8(b)(3) by such conduct. Since the General Counsel is dominus litus by virtue of Section 3(d) of the Act, he "has the power to decide whether to issue a complaint. . .and to determine what its legal theory should be." Local 282, International Brotherhood of Teamsters v. N.L.R.B., 339 F.2d 795, 799 (C.A. 2); accord: Waitresses & Cafeteria Women's Local No. 305 (Haleston Drug Store, Inc.), 86 NLRB 1166, 1170, aff'd. 187 F.2d 418, 421 (C.A. 9), cert. denied 342 U.S. 815; Tulsa General Drivers Warehousemen & Helpers, Local Union 523 (Rocket Freight Lines Co.), 176 NLRB No. 94. I therefore find that the issue raised by PMA is not properly before me.

22/ PMA argues that because of Respondent's continued unlawful insistence upon sponsorship, Phillips was unable to obtain class B registration and consequently lost referrals to jobs which he undoubtedly would otherwise have received. Accordingly, PMA requests a finding that Respondent violated Section 8(b)(2) by preventing Phillips from being assigned to his share of the longshore work, and an order requiring Respondent to make Phillips whole.

It is true that had Phillips been given class B registration, he undoubtedly would have received referrals thereafter inasmuch as the record shows numerous dispatches of unregistered men during 1969, thereby demonstrating that there were more jobs than available class A and B registrants. The difficulty is that the evidence does not support a finding that Phillips would have recieved [sic] class B registration even if sponsorship had not been required. The record shows that it was necessary for applicants to satisfy certain requirements in order to obtain class B registration, e.g., completeness of application for registration, work experience, availa-

bility for full-time employment, satisfactory health, and absence of criminal record. Since the evidence does not establish that Phillips would have been able to satisfy the necessary requirements, I cannot find that he would have been given class B registration even if Respondent had not insisted upon sponsorship. Accordingly, I cannot find that he was unlawfully denied dispatch.

23/ Since the Board in the Gatlin case ordered Respondent to cease and desist from requiring the use of sponsorship in connection with class B registration, it is unnecessary to repeat such an order herein.

24/ Cf. International Association of Heat & Frost Insulators and Asbestos Workers Local No. 53 (Mccarty & Armstrong), 185 NLRB No. 89.

25/ Ibid. There may be difficulty in ascertaining the identity of the unregistered men who were discriminatees and the amount of their earning losses. However, some help may be obtained from the lists like those in Exh. S-75 and S-77, attached to and respectively referred to in par. 30 and par. 32 of Joint Exh. 2. Exh. S-75 contains the name of each unregistered longshoreman who worked at the Port of Los Angeles-Long Beach in 1969. It also shows his payroll or work number, and identifies those who are TW members. Exh. S-77 shows the number of hours worked during the week of October 25 to November 1, 1969, be [sic] each such longshoreman, although it identifies them by payroll or work number rather than by name.

26/ In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusion, recommendations, and Recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and order, and all objections thereto shall be deemed waived for all purposes. In the event that the Board's Order is enforced by a judgment of a United States Court of Appeals, the words in the

notice reading "Posted by Order of the National Labor Relations Board" shall be changed to read, "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

27/ In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for Region 21, in writing, within 10 days from the date of this Order, what steps it has taken to comply herewith."

APPENDIX "F"

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, Petitioner, v. INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, LOCAL 13, Respondent.	)	No. 74-3158 ORDER

Before: DUNIWAY, HUFSTEDLER and ANDERSON,
Circuit Judges

The petition for rehearing is denied. The suggestion of a rehearing in banc has been circulated to all active members of the court. No judge has called for a vote upon the suggestion of a rehearing in banc. The suggestion of a rehearing in banc is rejected. Rule 35(b), F. R. App. P.

APPENDIX "F"

APPENDIX "G"

The pertinent provision of the Fifth Amendment is:

"...nor be deprived of life, liberty, or property, without due process of law...."

The pertinent provisions of 29 USC § 157 are:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title."

The pertinent provisions of 29 USC § 158 are:

"(b) It shall be unfair labor practice for a labor organization or its agents—

"(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein....

"(2) to cause or attempt to cause an employer

to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

"(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title. . . .

"(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession. . . ."

The pertinent provisions of 29 USC § 159 are:

"(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the

employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment."

The pertinent provisions of 29 USC § 160 are:

"(b) . . . [N]o complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made. . . .

"(c) . . . [W]here an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him. . . ."

No. 77-283

In the Supreme Court of the United States

OCTOBER TERM, 1977

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, LOCAL NO. 13, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

JOHN S. IRVING,
General Counsel,

JOHN E. HIGGINS, JR.,
Deputy General Counsel,

CARL L. TAYLOR,
Associate General Counsel,

NORTON J. COME,
Deputy Associate General Counsel,

LINDA SHER,
Assistant General Counsel,

DAVID S. FISHBACK,
Attorney,
National Labor Relations Board,
Washington, D.C. 20570.

INDEX

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-283

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, LOCAL NO. 13, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 549 F. 2d 1346. An earlier opinion (Pet. App. D) is not officially reported. The decision and order of the National Labor Relations Board (Pet. App. B) is reported at 210 NLRB 952. Earlier decisions of the Board in the same cases are reported at 183 NLRB 221 (Pet. App. C) and 192 NLRB 260 (Pet. App. E).

JURISDICTION

The judgment of the court of appeals was entered on March 15, 1977. On May 20, 1977, the court denied a petition for rehearing (Pet. App. F). The petition for a writ

of certiorari was filed on August 18, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Board properly found, in the circumstances of this case, that petitioner violated the National Labor Relations Act by administering a hiring hall in a manner that encouraged union support and discriminated in favor of union members, and by bargaining to impasse over the use of unlawful dispatch criteria.

2. Whether the Board properly ordered petitioner to make whole any job applicants who lost earnings because of petitioner's discriminatory exercise of its dispatch authority.

STATUTORY PROVISIONS INVOLVED

Section 10(c) of the National Labor Relations Act, as amended, 61 Stat. 147, 29 U.S.C. 160(c), provides in relevant part:

> * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint [has committed] * * * any such unfair labor practice, then the Board * * * shall issue * * * an order requiring such person * * * to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: *Provided*, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him * * *.

Other relevant provisions of the statute appear at Pet. App. G.

STATEMENT

I. The Board's Findings of Fact

The International Longshoremen's and Warehousemen's Union (on behalf of its local unions (including petitioner)) and the Pacific Maritime Association (PMA) (on behalf of its employer members) were parties to a collective bargaining agreement providing for the dispatch of longshoremen through jointly-controlled hiring halls. The Joint Coast Labor Relations Committee, made up equally of International and PMA representatives, was responsible for decisions concerning the operation of the hiring halls (Pet. App. B-6). The hiring halls were administered by dispatchers elected by the International's membership. First preference in dispatch to jobs was given to fully-registered ("Class A") longshoremen; second preference was given to limited-registered ("Class B") workers. When no registered longshoremen were available to fill the jobs, the hiring halls dispatched unregistered men. Only six Class A registrants were not members of the International; Class B registrants and unregistered men generally were not union members (Pet. App. A-7, B-6 to B-7).

The International had a policy requiring applicants for Class B registered status to be sponsored by an eligible Class A registrant. In November 1965 the Joint Coast Committee ordered that the sponsorship requirement be eliminated for future registrations (Pet. App. B-7, B-13, C-8 to C-10, E-4). But in 1967 and 1968, in the course of proceedings before the Los Angeles-Long Beach Joint Port Committee[1] to increase the number of Class B

---

[1] Each port had a Joint Port Labor Relations Committee (Pet. App. B-6 to B-7).

longshoremen, petitioner insisted that only applicants who had a sponsor should be considered for Class B status. The parties reached an impasse over petitioner's insistence, and the dispute was submitted to an arbitrator, who ruled on March 10, 1968, that petitioner had violated the collective bargaining agreement by insisting on sponsorship (Pet. App. B-7 to B-8, C-10 to C-12). Following the arbitrator's award, however, petitioner continued to insist on sponsorship, submitting to the Port Committee on October 2, 1968, a list of names for Class B registration which included only people with Class A sponsors (Pet. App. B-8, B-10, B-16, C-11 to C-13).[2]

As of July 15, 1968, under the plan of the Los Angeles-Long Beach Joint Port Committee, Class A and B longshoremen were dispatched from the Central Dispatch Hall, while non-registered longshoremen were given identification cards and dispatched by rotation from the "Dispatch Hall for Extra Longshore Work" (Extra Hall). In September 1968 petitioner unilaterally changed this system by dispatching from other locations (known as "runner locations") persons on strike in other industries. Moreover, petitioner also began, contrary to the Joint Port Committee agreement, to dispatch terminal warehousemen (known as "TW members" of the International)[3] to longshore jobs from the Central Dispatch Hall instead

---

[2]In June 1967 James Phillips, a casual longshoreman, completed an application for Class B registration. In February 1969 Phillips inquired of petitioner's Secretary-Treasurer Godfrey about the status of his application. Godfrey asked Phillips if he had a sponsor; when Phillips responded in the negative, Godfrey indicated that, if he wished to achieve Class B status, he would have to secure a sponsor (Pet. App. C-13).

[3]Terminal warehousemen were employed by various warehousing companies and were members of petitioner (Pet. App. C-8).

of from the Extra Hall. In 1969 petitioner increased the number of terminal warehousemen from 41 to 635. In the middle of that year, the number of unregistered workers who did not have union membership and were dispatched from the Extra Hall decreased substantially while the number of terminal warehousemen members dispatched from the Central Hall increased greatly (Pet. App. E-5 to E-7).

In early autumn 1969, the PMA offered a list of applicants for consideration for Class B status; petitioner countered with a proposal that all those on PMA's list who had worked more than 100 hours in longshore jobs in 1969 receive Class B status. PMA rejected this proposal, noting that most of those who had more than 100 hours of longshore experience were TW members who had gained that experience because of improper dispatching by petitioner (Pet. App. E-7).

On October 31, 1969, the Extra Hall was closed, and, thereafter work not assigned to Class A and B longshoremen went only to TW members at the Central Dispatch Hall or to extras at "runner locations." Consequently, most of those dispatches went to TW members as opposed to other unregistered applicants (Pet. App. E-7).

Thereafter, and until February 12, 1970, petitioner continued in its discussions with PMA to insist on either sponsorship for Class B registrants or preferential registration of those with substantial 1969 experience—*i.e.*, TW members. Finally, on February 12, 1970, petitioner's members voted to comply with the arbitration award of March 1968 and to drop the insistence on sponsorship (Pet. App. E-7).

II. The Decisions Below

The Board found that petitioner had prevented registration and dispatch of non-union members in violation of Sections 8(b)(1)(A) and (2) of the Act, 29 U.S.C. 158(b)(1)(A) and (2), by requiring applicants for Class B status to be sponsored by a member or former member with a withdrawal card, by giving preference to its TW members over nonmembers in dispatching unregistered men to longshore jobs, and by attempting to obtain preference in Class B registration for its TW members over nonmembers.[4] The Board further found that by its insistence upon union-member sponsorship or membership for Class B registration, petitioner refused to bargain in good faith in violation of Section 8(b)(3) of the Act. The Board ordered that petitioner, *inter alia*, make whole any applicants for employment for any loss of earnings they may have suffered by reason of petitioner's discriminatory exercise of its dispatch authority.

The court of appeals upheld the Board's decision and enforced its order in full (Pet. App. A). The court rejected petitioner's argument that the events found to be unfair labor practices were time-barred by Section 10(b) of the Act, 29 U.S.C. 160(b).[5] Quoting *Local Lodge No. 1424* v. *National Labor Relations Board*, 362 U.S. 411, the court

[4]The Board decision under review (Pet. App. B-1 to B-4) is a consolidation of two cases (Pet. App. C-1 to C-22 and E-1 to E-16). After the Board petitioned for enforcement of its orders in the two cases, the court of appeals remanded the Board's decision in one case for more detailed findings about "(1) the actual operation of the sponsorship program and (2) the effect of the program" (Pet. App. D-2). The court of appeals granted the Board's motion to withdraw its application for enforcement in the other case to enable the Board to take further evidence in the case consistent with the remand.

[5]Section 10(b) states that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board." The charge in one case was filed March 18, 1969; the charge in the other was filed November 3, 1968.

pointed out that, where unfair labor practices occur within the Section 10(b) period, antecedent events may be used to elucidate the character of those events (Pet. App. A-6). And the court noted that petitioner's refusal to consider Phillips for registration (see note 2, *supra*) occurred within the Section 10(b) period (Pet. App. A-6). The court explained that the Union continued to insist on the sponsorship system during the Section 10(b) period and made discriminatory referrals of TW members during that period (Pet. App. A-7, A-9).

The court also rejected petitioner's attack on the Board's remedial order. It stated (Pet. App. A-11):

> The Union argues that the back pay award would be "in the order of several million dollars" and would conceivably destroy the Union. At this stage, the assertion is speculative. Because the compliance stage of the proceedings has not yet been reached, we have no way of knowing the exact amount involved. Moreover, even if the award did reach the total contemplated by the Union, that does not change its nature from remedial to punitive. The Board is simply requiring the Union to reimburse those who lost income as a result of the Union's illegal discrimination. The Board is not ordering that the employees be made more than whole. Thus, the order merely removes the effects of the unfair labor practice by giving those who were its victims what they would have received absent the Union illegal practices.

ARGUMENT

1. Although unions may operate exclusive hiring halls pursuant to collective bargaining agreements with employers (*Local 357, Teamsters* v. *National Labor Relations Board*, 365 U.S. 667), they may not give preference to union members or encourage union membership or support. Preferences or membership encouragement are discrimination prohibited by Sections 8(b)(1)(A) and 8(b)(2) of the Act. *Radio Officers' Union* v. *National Labor Relations Board*, 347 U.S. 17, 31-33, 52. Petitioner does not dispute these settled principles. Rather, petitioner contends that no violations could properly be found here because the record fails to show unlawful discrimination with respect to dispatch or registration of specific applicants (Pet. 20-21) and that, in any event, the charges were time-barred (Pet. 17-19). These assertions raise no issue warranting review by this Court.[6]

---

[6]Petitioner also discusses (Pet. 19-20) whether the duty of fair representation extends to non-bargaining unit members. No such question is presented by this case. The collective agreement and the bargaining unit included all longshoremen, including non-registered workers, in the Los Angeles-Long Beach area (Pet. App. B-6 to B-8), and the victims of any discrimination therefore were within the bargaining unit.

Nor, as petitioner contends (Pet. 21), did the Board base its finding of a violation of Section 8(b)(3) on "a history of dozens of meetings, proposals and counterproposals, all dealing with registration of Class B longshoremen, and all culminating in a mutually agreeable registration." The Board found instead that petitioner reiterated its insistence on the unlawful sponsorship system throughout the negotiations until it relented on February 12, 1970 (Pet. App. B-7 to B-8, E-11). Insistence on unlawful terms and conditions of employment by either side in negotiations is a *per se* violation of the duty to bargain in good faith. *National Labor Relations Board* v. *Wooster Division of Borg-Warner Corp.*, 356 U.S. 342, 360 (Harlan, J., concurring); *National Labor Relations Board* v. *Amalgamated Lithographers of America*, 309 F. 2d 31, 42-44 (C.A. 9).

a. The Board need not always show specific instances of discriminatory conduct or intent. The Board need only show that a union adopted a practice, the natural and probable consequence of which is to encourage union membership or support. *Radio Officers' Union, supra,* 347 U.S. at 44-46. Class A members were almost uniformly union members. Because petitioner's insistence on the sponsorship system thus tended to coerce those desiring Class B status to acquire connections with union members, the system required loyalty to and association with petitioner and its members. Moreover, petitioner's insistence upon sponsorship successfully blocked for several years all registration of applicants for Class B registration and allowed the Union to give illegal dispatch preference to its non-registered TW members. This practice resulted in a pattern of unlawful discrimination for members as a group and against nonmembers as a group.[7] The Board found that the Union implemented its program specifically by refusing Phillips' application for Class B registration because it was not supported by a sponsor (see pages 3-5 and note 2, *supra*).

b. Contrary to petitioner's contention (Pet. 17-19), the court of appeals did not adopt a "continuing violation" theory to find that the charges were timely. The court found specific instances of unlawful conduct within the Section 10(b) period and properly considered antecedent events in those circumstances (see pages 6-7, *supra*). This case therefore does not present any question concerning the propriety of a "continuing violation" approach.

2. Petitioner's objection to the Board's order (Pet. 12-15) tracks its argument on the merits: it contends that

---

[7]See pages 3-5, *supra*.

a back pay award is inappropriate "without proof of loss by so much as one individual" (Pet. 13). To the extent that petitioner merely complains that the order does not identify particular discriminatees or the amounts owed them, those matters are appropriately left to the compliance stage of the Board proceedings (Pet. App. E-13 n. 25).[8] To the extent that petitioner contends that, as a matter of law, an award cannot be made on behalf of persons who have not complained of the discriminatory practices, this Court has recently rejected a similar contention respecting a pattern of discrimination violating Title VII of the Civil Rights Act of 1964. *International Brotherhood of Teamsters* v. *United States*, No. 75-636, decided May 31, 1977, slip op. 36-40. The Court noted approvingly the practice under the National Labor Relations Act of awarding relief to discriminatees who had made no specific complaint, stating: "The effects of and the injuries suffered from discriminatory employment practices are not always confined to those who were expressly denied a requested employment opportunity. A consistently enforced discriminatory policy can surely deter job applications from those who

---

[8]After a Board order has been entered, the appropriate regional office administratively determines compliance issues such as back pay. Where the respondent does not voluntarily accept the Regional Office's determination, the Board invokes administrative procedures, which culminate in a ruling by an administrative law judge on the contested issues. As with unfair labor practice cases, this ruling is reviewed by the Board. See Board's Rules and Regulations, 29 C.F.R. 102.52-102.59; Board's Statements of Procedures, 29 C.F.R. 101.16. Similarly, Board orders arising from compliance proceedings must be enforced by an appropriate federal court under Section 10(e) of the Act, 29 U.S.C. 160(e). See, generally, *National Labor Relations Board* v. *Local 138, International Union of Operating Engineers*, 380 F. 2d 244, 245-246 (C.A. 2).

are aware of it and are unwilling to subject themselves to the humiliation of explicit and certain rejection" (*id.* at 38).

Local 60, United Brotherhood of Carpenters v. *National Labor Relations Board*, 365 U.S. 651, upon which petitioner relies (Pet. 14), is not to the contrary. There the Board, seeking to remedy an unlawful closed shop preferential hiring system, ordered the union (in addition to making whole the employees who were victims of the discrimination) to reimburse all employees for any assessments collected by the union within six months of the filing of the unfair labor practice charge. 122 NLRB 396, 401. The Court pointed out that all of the affected employees were union members before the unlawful activity began and none was shown to have maintained membership because of it; it therefore held that the reimbursement requirement was not remedial. Here, on the other hand, the back pay remedy runs solely in favor of those against whom the union unlawfully discriminated. As the court of appeals stated (Pet. App. A-11): "The Board is simply requiring the Union to reimburse those who lost income as a result of the Union's illegal discrimination."

Finally, petitioner is incorrect in arguing (Pet. 15-16) that back pay is authorized under the Act only as an adjunct to reinstatement. The language of Section 10(c), 29 U.S.C. 160(c), providing for reinstatement with back pay does not, by its terms, limit back pay to situations in which reinstatement is ordered. See *National Labor Relations Board* v. *International Longshoremen's Union*, 378 F. 2d 125, 130 (C.A. 9), certiorari denied, 389 U.S. 846. It would make no sense to say that the Board lacks the power to redress cases in which illegal conduct wholly prevented employment and therefore would make "reinstatement" impossible.

The remedy here is limited to recoupment of income actually lost as a result of the discrimination. In the forthcoming back pay proceeding, petitioner will have the opportunity to show that particular claimants would not have worked even if the dispatch system had been carried out legally. *International Brotherhood of Teamsters* v. *United States, supra.* Petitioner is not entitled to set up the magnitude (and success) of its misconduct as a reason why there should be no relief at all.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

JOHN S. IRVING,
General Counsel,

JOHN E. HIGGINS, JR.,
Deputy General Counsel,

CARL L. TAYLOR,
Associate General Counsel,

NORTON J. COME,
Deputy Associate General Counsel,

LINDA SHER,
Assistant General Counsel,

DAVID S. FISHBACK,
Attorney,
National Labor Relations Board.

OCTOBER 1977.

DOJ-1977-10